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BHOPAL JUDICIAL COMMISSIONER'S COURT

1952

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PUBLIC SAFETY

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Bhopal J. C.'s Court

*A. I. R. (39) 1952 Bhopal 1 [C. N. 1.]

TRIBENI SARAN ADDL. J. C.

Govind Prasad Srivastava and another—Applicants v. The State of Bhopal.

Misc. Criminal Cases Nos. 78 and 79 of 1950-51, D/- 4-10-1950.

(a) Interpretation of Statutes—Constitution of India—Principles governing interpretation—Civil P. C. (1908), Preamble.

A Constitution is to be interpreted in the same manner as any other statute, viz., by reference to its terms and language and these alone. A constitution is not to be construed in a narrow and pedantic sense. The ordinary rules apply though their application is of necessity conditioned by the subject-matter of the enactment itself. A "broad and liberal" spirit should inspire those who interpret the Constitution but they are not free "to stretch or pervert" the language of the enactment in the interests of legal or constitutional theory. A constitution of Government is a living and organic thing which of all instruments has the greatest claim to be construed "*ut res magis valeat quam pereat*".

Where any particular provision is open to more than one construction it is only the logical one and the one that naturally flows from it which has to be accepted. For this purpose, it is often necessary to enter the mind of the framers of the Constitution, and to achieve this, it is dangerous to import anything not inherently present in it. [Paras 8, 9]

Anno. Civil P. C., Pre N. 7.

*(b) Constitution of India, Art. 226—Scope—Jurisdiction of High Court to issue order, directions or writs—Extent of—'Any other purpose', meaning of—Constitution of India, Arts. 32 (3), 247.

Article 226, as worded, means nothing more or less than that the High Courts are invested with jurisdiction 'in praesenti' to issue an order, direction or a writ as mentioned in the Article. [Para 9]

The words "Notwithstanding anything in Art. 32" occurring in the beginning of Art. 226 are not redundant. They have a special significance and cannot be ignored. They only mean that in spite of the provisions of Art. 32, every High Court shall be empowered to issue the writs of the sort specified in the Article. If it had been the intention of the framers of the Constitution to subject the exercise of this power to any future legislation by the Parliament, there could be no difficulty in finding suitable words for the same but the Article, as drafted, does not contain even the remotest suggestion that such was their

purpose : A. I. R. (37) 1950 Madh. B. 60, *Dissent*.

[Para 12]

The words 'any other Court' in Art. 32 (3) when read along with Art. 247 can only mean any Court other than a High Court, because when the High Courts have already been invested with powers under Art. 226, those words could not manifestly refer to a High Court. [Para 10]

The words "any other purpose" in Art. 226 mean nothing more than any other purpose ancillary to the enforcement of any of the rights conferred by Part III of the Constitution. They cannot mean 'for the enforcement of any legal right and the performance of any legal duty' : A. I. R. (37) 1950 Pat. 387 (F.B.), *Dissent*.

[Para 17]

(c) Judicial Commissioners' Courts (Declaration as High Courts) Act (1950), Ss. 5 & 6—Effect of Power of Judicial Commissioner of Bhopal to issue high prerogative writs—Constitution of India, Arts. 225 and 226.

By means of S. 5 of the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, every Judicial Commissioner's Court in Part (C) State has been declared to be a High Court for the purpose of Arts 132, 133 and 134 of the Constitution. Section 6 of the Act lays down that the provisions of Chap V, Part VI of the Constitution shall in their application to Judicial Commissioner's Court have effect subject to the exceptions and modifications specified in the said section. Articles 225 and 226 of the Constitution have been omitted from the exceptions and modifications to which S. 6 of the Act has been subjected which means that so far as the issue of the high prerogative writs or directions or orders mentioned in the aforesaid Article is concerned, a Judicial Commissioner's Court has been treated on the same level as other High Courts. [Para 13]

(d) Public Safety—Preventive Detention Act (1950), Ss. 3 (1) (a) (ii) and 7—Detention under—Grounds for—Power of Court to determine sufficiency of—Grounds should not be vague or indefinite—Particulars of activities of detenu need not be supplied.

In determining the validity of an order of detention under S. 3, Preventive Detention Act it is not open for the Court to determine the sufficiency of the reasons which induce the detaining authority to issue the order of detention nor to investigate into the evidence upon which the authority was satisfied that it was necessary to detain the person concerned against whom such an order is made. The satisfaction required under the section must be the satisfaction of the authority issuing the order but such authority must be reasonably satisfied that the detention of the person is necessary for the security of the State

or the maintenance of public order or communal harmony and the Court in the exercise of its powers will be competent to determine whether such an order could have been made by a person acting reasonably and if it is found that the authority did apply its mind in passing the order, it will set it aside : A. I. R. (36) 1949 Oudh 20, *Applied*.

[Para 21]

The omission of the word "particulars" in the Preventive Detention Act is not accidental but deliberate and decidedly it has widened the scope of the detaining authority's discretion. He is not now required to supply the detenu with the particulars of his activities. But the elimination of the necessity of mentioning particulars does not take away from the detaining authority the responsibility of not leaving the grounds vague and indefinite. They must also be such as to enable the detenu to make an effective representation to him. If the aforesaid conditions are not fulfilled, the grounds of detention cannot be called good and the detenus are entitled to be released.

[Para 29]

(Held on a consideration of the grounds supplied to the detenu that they were not good grounds and therefore the detenus were entitled to be released.)

R. A. Panjwani — for Applicants ; R. R. Bhamhani, Government Advocate — for the State.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases.)

('39) 1939 F. C. R. 18 : A. I. R. (26) 1939 F. C. 1 [Pr. 8]

('50) A. I. R. (37) 1950 S. C. 124 : (51 Cri. L. Jour 1514).

[Pr. 22]

('50) A. I. R. (37) 1950 Madh. B. 60 : (51 Cri. L. Jour 1352 (F.B.)).

[Pr. 3]

('42) A. I. R. (29) 1942 Mad. 735 : (44 Cri. L. Jour 143).

[Pr. 21]

('49) A. I. R. (36) 1949 Oudh 20 : (50 Cri. L. Jour 260).

[Pr. 21]

('50) A. I. R. (37) 1950 Pat. 337 : (51 Cri. L. Jour 1509 (F.B.)).

[Pr. 14]

Order.—This order disposes of two petitions made by Govind Prasad Shrivastava and Balkrishan Gupta for the issue of the writs of Habeas Corpus under Art. 226, Constitution of India. The applicants were arrested and detained by means of warrants issued by the Chief Commissioner, Bhopal, under the Preventive Detention Act 1950.

[2] The preliminary objection raised by the Government advocate relates to the jurisdiction of this Court in respect of the applications. His argument is that Art. 226 is only meant to lay down the powers which the High Courts could exercise, only if they possessed those powers; in other words, if a High Court does not already possess the powers specified in Art. 226 of the Constitution, the aforesaid Article does not empower it to exercise them and there is no remedy for the applicants except to go to the Supreme Court under Art. 32 (1) for the enforcement of fundamental right.

[3] The learned Government Advocate has cited *Anant Bhaskar v. State*, A. I. R. (37) 1950 Madh. B. 60; in which the majority of the learned Judges held the view:

"Unlike Art. 32 of the Constitution, Art. 226 does not provide for any remedy which, apart from the existing law, could be available to a person for enforcement of any of the rights dealt with in Part III of the Cons-

titution, i. e. fundamental rights. Art. 226 must be read subject to Art. 32 (3).

Article 226 only mentions some of the powers which, if law made by Parliament or other legislature so provides, may be exercised by the High Courts under the circumstances and conditions prescribed by such law. But so long as this is not done, the powers conferred by Art. 226 must remain ineffective except in so far as they can be exercised under the existing law."

The cornerstone of the abovementioned ruling is the distinction drawn by the learned Judges between the meaning of the words "jurisdiction", and "power". "Jurisdiction", according to the view taken by the learned Judges, is the authority conferred upon a tribunal to determine a matter, while "powers" are the means by which effect is given by the Courts to its determination. With this distinction in view, they quoted Art. 225 of the Constitution which lays down that the jurisdiction of and the law to be administered in any existing High Court and the respective powers of the Judges, thereof in relation to the administration of justice, shall be the same as immediately before the commencement of the Constitution.

[4] But while quoting the aforesaid Article, the most important part of it was lost sight of and it is "subject to the provisions of this Constitution." If the Article had not been armed with these words, the interpretation put upon it, in my opinion, would have been exactly what the learned Judges were pleased to put. But keeping in mind the abovenoted expression, it will have to be accepted that it has changed the whole picture of the Article. Reading Art. 226 along with Art. 225, with special emphasis on the words "subject to the provisions of this Constitution", I should find that the jurisdiction of existing High Courts as exercised immediately before the commencement of this Constitution has lost its rigidity.

[5] Jurisdiction, as is generally understood and even recognized in law, has two meanings:—

- (1) legal authority or the extent of power;
- (2) area over which such authority or power extends.

It will, therefore, be seen that the two meanings of the same word have a totally different concept and are not to be confused. The sense in which the word is used is to be governed by the context. With the greatest respect to the learned Judges, I fail to read in the meaning of the word "jurisdiction," as used in both the Articles, anything suggesting that there is any difference between the High Court's authority or power, as has been so ably made out in the ruling, except that the word "jurisdiction" in Art. 225 can have both the meanings ascribed to the term and it is merely in order to avoid confusion that the word "powers" has been deliberately used in respect of the Judges.

[6] The expression "subject to the provisions of this Constitution" with which Art. 225 begins,

implies not only the abridgment but also the expansion of the jurisdiction of any existing High Court. Article 226 is clearly an instance of the latter and Art. 230 of both.

[7] If, therefore, the distinction between the words "jurisdiction" and "power" is removed, there is no room left for holding that even if power has been conferred upon High Courts for any purpose, it cannot be invoked unless the Court has jurisdiction in respect of the matter for which the power is to be exercised.

[8] Sir Maurice Gwyer in *In the matter of C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, 1939 F. C. R. 18: A. I. R. (26) 1939 F. C. 1 has very ably and lucidly laid down the principles to be observed in interpreting a Constitution and the Indian Constitution is no exception. The learned Judge says:

"A Constitution is to be interpreted in the same manner as any other statute, viz. by reference to its terms and language and these alone. A Constitution is not to be construed in a narrow and pedantic sense. The ordinary rules apply though their application is of necessity conditioned by the subject matter of the enactment itself. A 'broad and liberal' spirit should inspire those who interpret the Constitution but they are not free 'to stretch or pervert' the language of the enactment in the interests of legal or constitutional theory. A constitution of Government is a living and organic thing which of all instruments has the greatest claim to be construed '*ut res magis valeat quam pereat*.'"

[9] This illuminating exposition of the principles governing the interpretation of a constitution introduces great elasticity therein and enables the Judges to do away with the wooden expounding of the provisions thereof. It is not disputed that any particular provision may be open to more than one construction but it is only the logical one and the one that naturally flows from it which has to be accepted. For this purpose, it is often necessary to enter the mind of the framers of the Constitution, and to achieve this it is dangerous to import anything not inherently present in it. Article 226, as worded, means nothing more or less than that the High Courts are invested with jurisdiction 'in praesenti' to issue an order, direction or a writ as mentioned in the Article. It has been argued by the learned Government Advocate that if it had been the intention of the Constitution makers to confer such powers on the High Courts for immediate use, Art. 32 (3) of the Constitution would not have found a place in it. This Article reads as follows:

"Without prejudice to the powers conferred on the Supreme Court by Cls. (1) and (2), Parliament may, by law, empower any other Court to exercise, within the local limits of its jurisdiction, any of the powers exercisable by the Supreme Court under Cl. (2)."

But if this sub-clause is read along with Art. 247, no doubt is left as to its object. Article 247 says:

"Parliament may, by law, provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List."

[10] By "any other Court" can only be meant any Court other than a High Court, because when

the High Courts have already been invested with powers under Art. 226, the above words could not manifestly refer to a High Court.

[11] The other argument of the learned Government Advocate is that Art. 32 prescribes that the responsibility of giving redress in cases of breach of Constitution rests solely with the Supreme Court and this is borne out by the fact that this Article is placed in the very core of Part III. The position of this Article in the Constitution seems only to have been affected by convenience. The same can be said of the place at which Art. 226 has been put. The mere fact that both these Articles are separated from each other is not enough to raise a conclusion that it is only Art. 32 which is exclusively concerned with the constitutional remedies.

[12] I think there is no difficulty in conceding that the words 'Notwithstanding anything in Art. 32' occurring in the beginning of Art. 226 are not redundant. They have a special significance and cannot be ignored. They only mean that in spite of the provisions of Art. 32, every High Court shall be empowered to issue the writs of the sort specified in the Article. If it had been the intention of the framers of the Constitution to subject the exercise of this power to any future legislation by the Parliament, there could be no difficulty in finding suitable words for the same but the Article, as drafted, does not contain even the remotest suggestion that such was their purpose. I fail to find any legal authority for introducing words which may give it a totally different shape, nor is it permissible to rob it of the object for which such wide powers have been conferred upon the High Courts.

[13] It is obvious that if the power to issue high prerogative writs had been confined to the Supreme Court, the distant places in the country would have been deprived of the benefit flowing from it. The independence of India would have been of no consequence to its citizens living in a remote corner of a country, if a legal stranglehold had been exerted upon the constitutional remedies by pinning them down to place beyond their reach. Independence would have had no significance for them if they had been robbed of the feeling of being independent. It was absolutely necessary that they should have been made to experience that feeling in every fibre of their being and in every cell of their body and mind, otherwise it would have been proper to tell them frankly that their constitutional remedy had been prescribed in the Constitution but they were powerless to achieve it. Such an action would have endowed the new organisation, the Republic of India, with little more than the sterility of creating barren aspirations in the mind of its citizens. Obviously, this could never have been the intention of the framers of the Constitution and, in my opinion, every High

Court now possesses the power to issue the directions, orders or writs specified in Art. 226.

[14] But it is not enough to hold that all the High Courts possess such powers. The issue requires further treatment and unless the extent of the powers of the High Courts is decided, the position will not be clarified. In this connection the learned counsel for the applicants has cited, *Bagaram Taloule v. The State of Bihar*, A. I. R. (37) 1950 Pat. 387, in which the learned Judges have taken the view :

"Article 226 contemplates the use of writs and directions for purposes other than the enforcement of the fundamental rights. At the same time, the words 'for any other purpose' in the Article can hardly mean that a High Court can issue writs for any purpose it pleases. The correct interpretation is that the words mean 'for the enforcement of any legal right and the performance of any legal duty.' To that extent the words must be used 'Ejusdem Generis' which is the ordinary principle of construction."

[15] The reason for this view as given in the ruling is :

"Article 32, which is the corresponding provision for the Supreme Court, does not contain these words but speaks merely of the enforcement of 'any of the rights conferred by this Part', and that is obviously because the original jurisdiction of the Supreme Court extends only to the enforcement of the fundamental rights and this view receives confirmation from the terms of Art. 139, which says : 'The Parliament may, by law, confer on the Supreme Court power to issue directions, orders and writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari or any of them for any purpose other than mentioned in cl. (2) of Art. 32.'"

[16] The learned Judges have come to the conclusion that Art. 226 contemplates the issue of writs and directions even for purposes other than the enforcement of fundamental rights, although they have held that the words can hardly mean that a High Court can issue writs for any purpose it pleases, and have expressed the opinion that the correct interpretation is that the words mean 'for the enforcement of any legal right and the performance of any legal duty' and to that extent the words must be read "ejusdem generis" which is the ordinary principle of construction.

[17] I feel very hesitant to differ from the exposition of the Article in question as made by such able Judges but the depth of my conviction is my only excuse for striking a dissenting note. The only point, however, on which I venture to differ from the learned Judges is whether, as they have held, the words 'for any other purpose' mean for the enforcement of any legal right and the performance of any legal duty. In my opinion, this interpretation is very wide and exceeds the spirit of Art. 226. If any doubt exists about the view taken by me, Art. 139 clears it. I cannot conceive that the Constitution-makers, while withholding from the Supreme Court powers to issue directions, orders or writs including the high prerogative writs mentioned in Art. 32 (2) for any purpose other than those mentioned in the aforesaid clause, would have considered it proper to confer such

extremely wide powers on the High Courts. I should think that the words "any other purpose" mean nothing more than "any other purpose ancillary to the enforcement of any of rights conferred by Part III". I am inclined to read the phrase "for the enforcement of any of the rights conferred by Part III" with special emphasis on the word "enforcement" and if this is done for the interpretation of the words "any other purpose," I believe the position will be perfectly clarified so as to mean that the words "any other purpose" cannot be divested from the word "enforcement" with which they are inextricably bound. Moreover, the use of the conjunctive word "and" between the two phrases mentioned above further supports this view. If the intention had been different, the disjunctive word "or" should have been used so as to extend the sphere of the jurisdiction of the High Courts as covering any purpose not even remotely connected with the enforcement of any of the rights conferred by Part. III. But as I have mentioned above, in view of the provisions of Art. 139, nothing could be further from the mind of the framers of the Constitution than to give unlimited powers to the High Courts in the matter of issuing directions, orders or writs for any purpose whatsoever. To give the Supreme Court limited powers in this respect and for the rest subject it to further legislation while conferring unlimited powers on High Courts is a factor which cannot be ignored. Keeping all the aspects into consideration, I believe, I am bound to hold that the words "any other purpose" mean that the purpose must be ancillary to the enforcement of the rights conferred by Part. III of the Constitution.

[18] So much for the powers of the High Courts. But this does not dispose of one other objection raised by the learned Government Advocate. He had urged that when the High Courts did not possess power to issue the high prerogative writs, the Judicial Commissioner's Court, which was not even a High Court, could not be treated on a higher level. This objection is related to his preliminary objection that the High Court did not possess the power to issue such writs but that point having now been decided, this requires very little comment. By means of S. 5, Judicial Commissioner's Courts (Declaration as High Courts) Act, 1950, every Judicial Commissioner's Court in Part (C) State has been declared to be a High Court for the purpose of Arts. 132 133 and 134 of the Constitution. Section 6 of the Act lays down that the provisions of Chap. V, Part. VI of the Constitution shall in their application to Judicial Commissioner's Court have effect subject to the exceptions and modifications specified in the said Section. Articles 225 and 226 of the Constitution have been omitted from the exceptions and modification to which S. 6 of the Act has been subjected which means that so far as the issue of the high prerogative writs or directions

or orders mentioned in the aforesaid Article is concerned, a Judicial Commissioner's Court has been treated on the same level as other High Courts. As such, this contention of the learned Government Advocate must also be overruled.

[19] I now deal with the applications on their merits. The grounds of detention supplied to both the applicants are exactly similar and they are :

"(1) That you have been inciting the labourers of the New Bhopal Textiles Ltd. to make an illegal demand for an extra half hour recess in the evening for 'Iftar' during the month of Ramzan.

(2) That you have been inciting the same labourers to take this extra half an hour illegally, as a result of which many of them took this extra recess illegally.

(3) That in this manner you, in fact, caused an illegal strike in the Mills every day for half an hour.

(4) That you have been inciting the same labourers to take an extra half hour recess illegally on Friday afternoon for prayers.

(5) That you have in these days by inciting Muslim labourers to put forth communal and sectarian demands caused a cleavage between Hindu and Muslim labourers on communal lines which is likely to lead to a breach of the peace.

(6) That instead of advising labourer to make their representation against the declarations of one month's bonus by the Management in a peaceful manner, you have been inciting them to hold demonstrations which were likely to lead to a breach of peace.

(7) That though you have not declared yourself to be a Communist, you have, by the above methods, been trying to create chaos and confusion and to submit the existing order by violent and illegal means.

You are further informed that you have a right to make a representation to me in writing against this order.

Chief Commissioner".

14-7-1950.

[20] Both the detenus have denied the allegations made against them.

[21] It is well settled that the grounds must not be vague and indefinite and for the purpose of judging by that standard, it will have to be seen whether they fulfil this requirement. Of course, as has been held in *Ghulam Hussain v. Rex*, A. I. R. (36) 1949 Oudh 20, it is not open for the Court to determine the sufficiency of the reasons which induce the detaining authority to issue the order of detention nor to investigate into the evidence upon which the authority was satisfied that it was necessary to detain the person concerned against whom such an order is made. The satisfaction required under the section must be the satisfaction of the authority issuing the order but the learned Judges say that such authority must be reasonably satisfied that the detention of the person is necessary for the security of the State or the maintenance of public order or communal harmony and the Court in the exercise of its powers will be competent to determine whether such an order could have been made by a person acting reasonably and if it is found that the authority did not apply its mind in passing the order, it will set it aside. Paras one to four of the grounds for detention by themselves do not at all come within the ambit of the Preventive Detention Act. It is only para

five which has attempted to bring it within the mischief of S. 3 (1) (a) (ii) of the Act but the preceding paragraphs can be called the cause and para five the effect. What I am concerned with is whether the ground for detention, as laid down in paras one to four, show that the mind of the detaining authority was reasonably applied in framing the detention order and whether para five can be the logical consequence of the activities of the detenus as stated in the preceding paragraphs. In my opinion, a demand cannot be called illegal simply because it is fantastic. In *In re Adati Appalaswamy*, A. I. R. (29) 1942 Mad. 735, the learned Judge expressed the view that:

"strikes and lock outs, though clumsy and injurious are the only means to decide these matters. The calling of strikes is not illegal."

In this case evidently the stage has not reached a point when such observation of a general nature might be called for but it can be said without fear of contradiction that a demand of the workers for an extra half hour recess in the evening for 'Iftar' during the month of Ramzan or for prayer on Friday afternoons can in no way be called illegal, however improper in the eyes of the Management it may be. It is quite a different thing that the Management of the Mill might not have found it possible to grant the recess claimed. I do not also see how the detenus by inciting the Muslim labourers to put forth such communal and sectarian demand could cause a cleavage between the Hindu and Muslim labourers on communal lines. At the utmost it could only agitate the Hindus to make a similar demand for their prayers. By any stretch of imagination I am unable to see how such demands on behalf of one sect could lead to breach of the peace.

[22] The learned counsel for the applicants has raised objection to the use of the expression "breach of the peace" in the grounds of detention. He has urged that these words do not find place in the Preventive Detention Act, which has used the words "the maintenance of public order". He makes a distinction between the words "peace" and "public order". Indeed the omission of the word "public" before "peace" has restricted the sense but in order to read the mind of the detaining authority, it is enough to assume that what he actually meant was the public peace and not the peace of an individual. "Public order", as the Supreme Court has held in *Remesh Thappar v. The State of Madras*, A. I. R. (37) 1950 S. C. 124 at p. 127:

"is an expression of wide connotation and signifies the state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted."

This definition shows that 'public peace' is covered by the expression 'public order.' I had to make the position in this respect clear because the same expression "breach of the peace" has been used in para six of the grounds of detention.

[23] Turning to para six, I find that the assertion is quite vague. The whole scheme of this paragraph revolves on the word "demonstrations." "Demonstrations," as will be readily admitted, may be of various kinds. One can demonstrate by taking out processions, by raising slogans and even by a hunger strike at or near the place concerned. There are also other methods too numerous to mention and simply the use of the word "demonstration" does not disclose to the detenu what is actually meant to be conveyed to him and if he is precluded from making an effective representation to the detaining authority, the whole purpose of S. 7, Preventive Detention Act is frustrated. In this case I am constrained to hold that the word "demonstrations" is quite vague and still less does it show as to how they were likely to lead to a breach of peace. I do not lay so much emphasis upon the use of the unauthorised word "peace" instead of "public order," for the warrant of detention has been drawn up according to the language used in the Act which is enough to remove any doubt on that account, as I do on the vagueness of this ground of detention.

[24] Ground No. 7 would have been quite sufficient to declare the detention order valid, had it not been for the fact that the whole effect of the grounds of detention has been marred by the use of the words 'by the above methods.' These words have obviously limited the detenus' methods to those specified in the foregoing paragraphs but they do not certainly lead one to the conclusion that the methods of the detenus were violent. This conclusion is not warranted by the premise. To satisfy the requirement of S. 3 (1) (a) (ii) of the Act, the premise and the conclusion both must fall within the four corners of its provisions.

[25] The learned counsel for the applicants has invited my attention to two cases which have been decided by the Supreme Court and the Bombay High Court. They are so recent that they have not yet been reported in any authorised journal and for this reason alone I cannot cite them on an authoritative basis. But inasmuch as they have been published in two leading newspapers of India, the Hindustan Times of 11.9.1950 and the Times of India of 10.8.1950, I am simply referring to the news as being of particular interest in this case.

[26] Sardar Sohan Singh Josh, a prominent leader of Punjab, was ordered to be released by the Supreme Court after a detention of about 2½ years. One of the grounds of his detention was that he had attempted to organise an armed revolution of Kisans to attend the Communist Party Congress. This ground was held by the Hon'ble Mr. Mahajan to be absolutely vague.

[27] In the other case, the Bombay High Court ordered the release of Mrs. Parbati Bai Shankar Bhoir, Joint Secretary of the Bombay Girni

Kamgar Union (Red Flag) who was arrested in March 1949, and kept under detention first under the Bombay Public Security Measures Act and subsequently under the Preventive Detention Act. The ground supplied to the detenu was that she was engaged in organising acts involving violence and disorder with a view to bring about an illegal general strike of workers in Greater Bombay and that she was likely to continue to do the same.

[28] If the reports are correct, as I have every reason to presume they are, the grounds of detention in this case do not even touch a fringe of the grounds for the detention of the aforesaid detenus in seriousness.

[29] The learned counsel for the applicants has cited many rulings of various High Courts but as the Security Acts prior to the inauguration of the Constitution generally laid stress not only on grounds but also on particulars, the rulings cannot be treated as prescribing a general rule such as to make it applicable to the Act under which the detention orders are now made. The omission of the word "particulars" in the Preventive Detention Act is not accidental but deliberate and decidedly it has widened the scope of the detaining authority's discretion. He is not now required to supply the detenu with the particulars of his activities. But the elimination of the necessity of mentioning particulars does not take away from the detaining authority the responsibility of not leaving the grounds vague and indefinite. They must also be such as to enable the detenu to make an effective representation to him. If the aforesaid conditions are not fulfilled, as I find in this case, the grounds of detention cannot be called good and the detenus are entitled to be released.

[30] The applicants are ordered to be released unless they are required to undergo their trial in connection with any other offence.

K.S.

Detenus released.

A I. R. (39) 1952 Bhopal 6 [C. N. 2.]

SATHAYE J. C

Wahid Ali—Applicant v. The State of Bhopal.
Criminal Misc. Case No. 82 of 1950-51, D/- 14.10.1950.

(a) Constitution of India, Art. 226 — Jurisdiction of Judicial Commissioner's Court, Bhopal to entertain and decide application under Art. 226.

The Judicial Commissioner's Court, Bhopal, declared as a High Court, under the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, has jurisdiction to entertain, hear and decide an application under Art. 226, Constitution of India: A. I. R. (37) 1950 Madh-B. 60, *Dissent.*; A. I. R. (39) 1952 Bhopal 1, [Para 7] *Approved.*

Anno. O. P. C., App. III; Const. of India, Art. 226, N. 1.

(b) Interpretation of Statutes — Place of particular provision — Relevancy.

It is not altogether safe to interpret a provision of law simply on the consideration of its place in the legislation. [Para 8]

(c) Public Safety — Preventive Detention Act (1950), S. 3 (1) — Requisite satisfaction of detaining authority — Omission to mention details of S. 3 (1) in detention order — If indicates carelessness on part of detaining authority — Detention order by Chief Commissioner, Bhopal — Omission to state place of activity — Effect.

Where the preamble of the detention order clearly states the purpose with which the order is passed viz., to prevent the detenu from acting in a manner prejudicial to the maintenance of the public order and the security of the State, nothing more is required to be stated in the order. The mere fact that the order omitted to state that the order was passed under sub-cl. (ii) of cl. (a) of sub s. (1) of S. 3 of the Act, does not indicate any carelessness on the part of the detaining authority. If at all it indicates anything it may be said to be a typing or clerical omission: A. I. R. (32) 1945 Bom. 212, *Disting.* [Para 12]

Where the detention order is passed by the Chief Commissioner, Bhopal, the presumption that the authority acted within its jurisdiction and powers clearly arises and implies and indicates the place of the activities unless it is otherwise shown: A. I. R. (35) 1948 Bom. 360, *Disting.* [Para 13]

It is the authority and not the person who has to be satisfied and who has to furnish the grounds on which the detention order was passed. [Para 14]

(d) Public Safety — Preventive Detention Act (1950), S. 3 (1) — Satisfaction of detaining authority — Proximate and past activities of detenu.

It is no doubt true that the detaining authority could take into consideration the proximate and immediate past of the detenu while passing an order of detention, but it is only the immediate past, antecedents and the history of the detenu, that alone could be taken into consideration if there be nothing between that immediate past and the order of detention: A. I. R. (37) 1950 Mad. 162, *Rel. on.* [Paras 15, 24]

It is impossible to gauge the mental attitude of the detenu as it existed about the time the detention order was passed by its comparison with that obtained six months before. [Paras 23, 24]

(e) Public Safety — Preventive Detention Act (1950), S. 7 — Detention grounds — Vagueness — Statement in grounds that detenu was responsible for strike — Fact that strike was illegal not mentioned — Ground if vague.

Merely stating in the grounds for detention that the detenu was responsible for strikes amongst the labourers without mentioning whether they were legal or illegal is not a ground of such precision or adequacy as to enable the detenu to make a representation against the order of detention: A. I. R. (36) 1949 Pat. 236, *Foll.* [Para 21]

(f) Public Safety — Preventive Detention Act (1950), S. 7 — Detention grounds — Vagueness of mind of detaining authority.

The detention grounds are liable to be examined not with a view to ascertain their existence as a fact, but with a view to examine the state of the mind of the detaining authority. If the state of the mind of the detaining authority discloses that he has been casual in his approach and that he has not applied his mind with that diligence which is necessary when the question is of taking away the liberty of a subject the Court will interfere and will set at liberty the detenu arrested by the order of the detaining authority: A. I. R. (36) 1949 Bom. 75, *Foll.*; A. I. R. (37) 1950 Bom. 126 and A. I. R. (36) 1949 All. 748, *Rel. on.* [Para 26]

R. A. Panjwani — for Applicant; R. R. Bhambani, Government Advocate — for the State.

Cases referred to : —

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

(39) A.I.R. (26) 1939 F. C. 1 : (1939 F. C. R. 18). [Pr. 11]

(49) A. I. R. (36) 1949 All. 748 : (1949 All. L. J. 207).

[Pr. 26]

(50) Mis C. Cri. Cases Nos. 78 and 79 of 1950-51: (A. I. R. (39) 1952 Bhopal 1)

[Pr. 7]

(33) A. I. R. (20) 1933 Bom. 65 : (34 Cri. L. J. 231).

[Prs. 17, 18]

(45) A. I. R. (32) 1945 Bom. 212: (46 Cri. L. J. 608 F. B.).

[Pr. 12]

(48) A. I. R. (35) 1948 Bom. 360 : (49 Cri. L. J. 524).

[Prs. 13, 20]

(49) A. I. R. (36) 1949 Bom. 75 : (50 Cri. L. J. 173).

[Pr. 26]

(49) A. I. R. (36) 1949 Bom. 95 : (50 Cri. L. J. 320).

[Pr. 17]

(50) A. I. R. (37) 1950 Bom. 126 : (51 Cri. L. J. 665).

[Pr. 26]

(50) A. I. R. (37) 1950 Madh. B. 60 : (51 Cri. L. J. 1352 F. B.).

[Prs. 6, 11]

(42) A. I. R. (29) 1942 Mad. 735 : (44 Cri. L. J. 143).

[Pr. 21]

(50) A. I. R. (37) 1950 Mad. 162 : (51 Cri. L. J. 525).

[Pr. 15]

(49) A. I. R. (36) 1949 Pat. 236 : (50 Cri. L. J. 497).

[Pr. 21]

(1942) Greene v. Secy. of State for Home Affairs : (1942 A. C. 284).

[Pr. 12]

Judgment.—This is an application under Art. 226 of the Constitution of India for a writ of habeas corpus to release the applicant from his detention under the Preventive Detention Act of 1950.

[2] By an order dated 7.3.1950, the Chief Commissioner, Bhopal directed that the applicant Wahid Ali alias Buddhu son of Ahmedali, resident of Bhopal be detained for one year from the date of the order. The applicant, however, could not be arrested immediately after this order and was arrested only on 5.6.1950 and the Chief Commissioner, on 13.6.1950 forwarded to him the grounds of the order of detention.

[3] The applicant filed this petition on 21.8.1950, alleging that the grounds for his detention were mala fide, vague and indefinite; and that the petitioner was a peaceful, respectable citizen and the encroachment on his fundamental rights of personal liberty given under the Constitution of India, by the Chief Commissioner of Bhopal was wholly unwarranted and against law.

[4] On 29.9.1950 the petitioner filed an affidavit in which he stated that the detention order was defective and inaccurate and invalid; and therefore his detention was illegal; that the detaining authority had not applied its mind at the time of issuing the detention order; that the said authority had acted mala fide and indifferently; that before the detention order was issued, the call for one-day token strike of the Railways, on 9.3.1950 was withdrawn; that he never went under-ground nor concealed himself nor had absconded after his release on 3.3.1950; that the authority had taken no steps under S. 6 of the Preventive Detention Act. On 30.9.50, the Home Secretary, Bhopal filed an affidavit in which it was stated that the detaining authority had carefully examined all the reports received against the applicant and which the authority believed to be true and accurate; and was perfectly satisfied that the detention of the petitioner was essential

to prevent him from acting in any manner prejudicial to the security of the State of Bhopal and the maintenance of public order therein; that the detaining authority had not acted mala fide in this behalf and the grounds of detention were bona fide and correct and were not vague and that the detention order was perfectly valid and legal.

[5] On 18-9-50, at the first hearing of the petition, the counsel for the petitioner filed an application to treat the original application not only under Art. 296, Constitution of India Act, but also as one under S. 491, Criminal P. C. But at the next hearing on 3-10-50 he filed another application that the petition be heard only under Art. 226, Constitution of India Act, and not under S. 491 *ibid.* It is, therefore, clear that the application has to be dealt with only as one under the former provision of law under the Constitution of India.

[6] On behalf of the State the learned Government Advocate raised a preliminary objection to the jurisdiction of this Court, even as a High Court, to hear the application under Art. 226 of the Constitution and urged that this Court had no such jurisdiction to entertain and decide such application. In support of his contention he referred to the decision of the Madhya Bharat High Court in *Anant Bhaskar v. State*, A. I. R. (37) 1950 Madh. B. 60. The point for determination, therefore, is whether the Judicial Commissioner's Court Bhopal declared as a High Court under the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, has jurisdiction to entertain, hear and decide the application. It was urged that Art. 226 of the Constitution only provided for powers to issue such directions or orders as stated in the Article, but did not provide for jurisdiction; that is such of the High Courts, as had such jurisdiction, had alone powers to issue the directions or orders so long as the Parliament did not, under Art. 32 (3) of the Constitution, make law investing these High Courts with such jurisdiction. On the other side, it is contended that Art. 226 gave additional powers as well as jurisdiction even to these High Courts besides those available under S. 491, Criminal P. C. and that Art. 226 (2) of the Constitution makes this position perfectly clear.

[7] In this connection I have only to observe that after perusing the decision of the Madhya Bharat High Court as referred to by the learned Government Advocate I must confess that I could not persuade myself to accept the contention in this behalf. The learned Chief Justice (Kaul G. J.) has dealt with the various points which arose for consideration and has discussed them at length. On the other side, however, my learned brother Tribeni Saran, A. J. C. had an earlier opportunity to deal with this matter; and in *Govind Prasad Shrivastava v. State of Bhopal*, Misc. Cr. Cases Nos. 78 & 79 of 1950-51, D/- 4-10-50 he has dealt

with all the points and considerations at length and in an able and lucid manner refuted the observations as also the reasons stated by the Madhya Bharat High Court in its decision *ibid.* I have perused both the decisions carefully and for the reasons stated by my learned brother in the above cases I have no hesitation in coming to the conclusion that this Court has jurisdiction to entertain, hear and decide the application, under Art. 226 of the Constitution.

[8] I have only to add that to my mind it is not altogether safe to interpret a provision of law simply on the consideration of its place in the legislation. Even if such consideration were to be made in this behalf, I would only point out that Art. 226 cannot be said to have been misplaced, and that its place in Chap. V of the Constitution does not militate against such jurisdiction to these High Courts as found that article. If provision is made for enforcement of the Constitutional remedies in Art. 32 (1) & (2) by guaranteeing the right to move the Supreme Court it would be found that Art. 226 can be said to be at its proper place while dealing with Chap. V in respect of the High Courts in the State. In the circumstances, to my mind, the fact that Art. 226 does not find place in the Chapter on the constitutional remedies cannot derogate from the powers and the jurisdiction of the High Courts as found in Chap. V.

[9] My learned brother has, at p. 3 of his order, dealt with and considered the distinction between jurisdiction and power referred to in para. 12 of order of Madhya Bharat High Court. The significance and its importance of the expression by which Art. 226 opens cannot be lost sight of and I am in entire agreement with Shri Saran, A. J. C., in his observations in this behalf.

[10] Dealing with the jurisdiction of the Supreme Court and its powers to enforce the right to constitutional remedies, read with the contention of the learned Government Advocate the question arises as to whether even the Supreme Court had such original jurisdiction to deal with these applications for enforcement of the above remedies. The gravamen of the argument of the learned Government Advocate was that it is only the High Courts, which have original jurisdiction as distinguished from the appellate and revisional jurisdiction that have the power to deal with such applications for the purposes as found in Art. 226. It would, however, appear that if the same test were applied to the jurisdiction of the Supreme Court in my opinion a similar difficulty would arise. It must appear that a provision is made in the Constitution for the original jurisdiction of the Supreme Court in Art. 131 alone and a perusal of that article clearly shows that it is confined only to certain parties and to certain matters. Under Art. 139 the Parliament is authorised to make law, conferring on the Supreme Court power to issue directions, orders or writs etc., for any

purposes other than those mentioned in clause (2) of Art. 32. An examination of the provisions, in the matter of the original jurisdiction of the Supreme Courts clearly indicates that the Supreme Court can be said to have no jurisdiction even to deal with these matters and it appears to me that Kaul C. J. was conscious of this difficulty as found in para. 23 of the order wherein he observes :

"It was pointed out that there is no express provision in the constitution investing the Supreme Court with the original jurisdiction to entertain an application for the enforcement of fundamental rights. This is true. But the language of Art. 32 (1) by necessary implication confers such jurisdiction on that Court."

He then goes on to refer to the absence of any such clause, corresponding to Art. 32 (1), in Art. 226 and feels that this indirectly lends strong support to the view taken by him. Clause (2) of Art. 226 in my opinion however, makes it perfectly clear that the power conferred on a High Court by cl. (1) shall not be in derogation of the powers conferred on the Supreme Court by cl. (2) of Art. 32. If it is only by implication that the Supreme Court can be clothed with such jurisdiction in these matters there is no reason why the same rule should not be applicable to these High Courts. In my opinion, however, it is not necessary to bank on the implication in view of the express provision as found in Art. 226 read with Art. 225 with pointed attention to the expression with which the latter article begins or opens.

[11] At pages 7 & 8 of his order, Tribeni Saran A. J. C. has dealt with the consideration of the anxiety and keenness of the legislature to preserve and protect the fundamental rights of every individual and afford a remedy to him whether he is at the farthest corner of the Republic of India or whether he is a millionaire or a pauper. In my opinion, that anxiety and keenness of the legislature has to be borne in mind while interpreting the provisions of the Constitution. It seems unnecessary for me to refer to the principle of construction of the Constitution as laid down by Sir Maurice Gwyer in *In the matter of C. P. and Bear Sales of Motor Spirit & Lubricants Taxation Act, 1938* A.I.R. (26) 1939 F.O.1, referred to by Tribeni Saran A. J. C., at p 4 of his order. The contention of the learned Government Advocate, that when the High Courts do not possess power to issue the high prerogative writs the Judicial Commissioners' Court which was not even a High Court could not be treated on a higher level, can be disposed of only by reference to s. 6, Judicial Commissioners' Courts (Declaration of High Courts) Act, 1950 and by the pointed attention to the fact that Arts. 225 and 226 do not find place in the exceptions and modifications specified in the said section. Lastly, I have only to observe that I have given my best thought and anxious consideration to the points noted by the learned Judges of the Madhya Bharat High Court in *Lagu's case*, (A. I. R. (37)

1950 Madh. B. 60 F. B.) and that with the greatest respect for the learned Judges I cannot persuade myself to accept their view and I find that the contention of the learned Government Advocate as stated in the earlier part of this order cannot be supported.

[12] Turning then to the merits of the case the learned counsel of the petitioner attacks the order dated 7.3.50 passed by the then Chief Commissioner, Bhopal. It is urged that it was obvious that the authority did not apply its mind to the case of the petitioner as the reference to the provision of law under which the order is passed is vague and cannot fit in with the preamble of the order. It is, therefore, necessary to quote the order passed. It runs as follows:

"Whereas the Chief Commissioner is satisfied with respect to the person known as Wahidali alias Budhoo son of Ahmed Ali, resident of Bhopal that with a view to preventing him from acting in a manner, prejudicial to the maintenance of public order and the security of the State, it is necessary to make the following order:

Now, therefore, in exercise of the power conferred by sub-s. (1) of S. (3), Preventive Detention Act, 1950 (No. IV of 1950), the Chief Commissioner hereby directs that the said Wahidali be detained for one year from the date of this order."

Dated 7th March, 1950.

Chief Commissioner,
Bhopal".

It is urged that Sub-s. (1) of S. 3 of the Act contains two cls. (a) and (b) and Cl. (a) again contains three sub-clauses and it is not clear under which clause or sub-clause the order is passed. It is urged that this omission to state the exact clause or sub clause under which the order is passed indicates that the Chief Commissioner, Bhopal, while passing this order, had not applied his mind to the case of the petitioner. Reference is made to the case of *Keshav Gokhale v. Emperor*, A. I. R. (32) 1945 Bom. 212 and reading it at p. 214 it is urged that the care and meticulous investigation as required before such an order is passed are pointed out in the case of *Benjamin Greene*, (1942) A. C. 284.

A perusal of the decision, however, of the Bombay High Court clearly shows that the District Magistrate who passed the order had not even looked into the case of Keshav Gokhale and had signed it in a mechanical manner. It appears that it was a cyclo-styled form which the said Magistrate had merely signed.

In the case on hand, however, in my opinion, the preamble of the order clearly states the purpose with which the order is passed viz: to prevent Wahid Ali from acting in a manner prejudicial to the maintenance of the public order and the security of the State. Nothing more, in my opinion, was required to be stated in the order. The only omission is found in the latter part of the order is that it should have stated that the order was passed under Sub-cl. (ii) of Cl. (a) of Sub-s. (1) of S. 3, of the Act and the fact that this was omitted does not indicate any carelessness on the part of the detaining authority. If at

all it indicates anything it may be said to be a typing or clerical omission. In view of the definite wording used in the preamble of the order as pointed above, in the circumstances, this ground of attack on the order falls through.

[13] It was then urged that the place of the activities of Wahidali has not been specified in the order and this again indicates that the authority did not apply its mind to the case. Reference is made, in this connection, to the decision in *In Re Krishanaji Gopal*, A. I. R. (35) 1948 Bom. 360 at pp. 362 and 363. It is urged that this authority appears to require the detaining authority to specify the place of the activities which the authority desired or thought fit to prevent. It must be remembered, however, that it was an order passed by the District Magistrate who had only limited territorial jurisdiction confined to his district; then again the order was passed under the Bombay Public Security Measures Act (No. VI [6] of 1947), under which a person's activities prejudicial to the public safety and the maintenance of public order and tranquillity could be prevented. In the case on hand, it is the Chief Commissioner, Bhopal who has passed the order. The Chief Commissioner's authority in Bhopal is that of the State Government or rather the Government of the Bhopal State. Under the present Act, under which the order is passed, he has sought to prevent the activities prejudicial to the maintenance of public order and the security of the State. In my opinion, therefore the presumption that the authority acted within its jurisdiction and powers clearly arises and implies and indicates the place of the activities unless it is otherwise shown. In the circumstances, to my mind, the decision in *Brahmes case* is liable to be distinguished from the case on hand.

[14] It was then urged that the order dated 7.3.50 was passed by Shri Bonnarji, the then Chief Commissioner, Bhopal, while the grounds were supplied by the present Chief Commissioner, Shri V. Vishwanathan on 13.6.50 and therefore, it could not be said that these were the grounds which had satisfied the then Chief Commissioner, Shri Bonnarji in the matter of the requisite satisfaction before passing the order. In my opinion, the contention has no substance. I am clear that it is not the satisfaction of the individual but of the authority that is required. If the contention of the learned counsel of the petitioner were to be accepted then in case of unfortunate death of the person in authority immediately after the passing of the order would prevent the grounds being stated to the detenu. It is the authority and not the person who has to be satisfied and who has to furnish the grounds on which the order was passed. It would appear that the words used in S. 3 (1) of the Act are, "The Central Government or the State Government" and it cannot be deemed to be a person or an individual. The words used in S. 7 of the Act are, "the authority

making the order shall — etc." These words clearly demolish the contention of the petitioner in this behalf. Then again a perusal of the statement of the grounds dated 13.6.1950 would show that it was not Shri V. Vishwanathan that professed to have been satisfied, in his personal private capacity, and stated the grounds for such satisfaction. It is the Chief Commissioner of Bhopal, who is the State Government of Bhopal that passed the order and it was the Chief Commissioner that furnished the grounds as required under S. 7 of the Act. In the circumstances, I am perfectly clear that the contention of the petitioner's learned counsel has no substance.

[15] It was then stated that the petitioner Wahidali was admitted by under detention till 3.3.1950 under an order dated 4.9.1949 under the Bhopal State Public Safety Act of 1947 and was released on the former date i. e. 3.3.50. The order dated 7.3.50 does not specify the activities of the applicant between 3.3.50 and 7.3.50 which were considered to be prejudicial and therefore, there was no cause for reasonable satisfaction regarding his future conduct and therefore, the satisfaction required under S. 3 was *mala fide* as the detaining authority relied on the previous history or antecedents without giving the petitioner an opportunity to show that since his detention he had ceased bearing all thought of acting in a prejudicial manner. It would, however, appear that the detaining authority can take into consideration the proximate and immediate past of the detenu while passing an order of detention. I am supported in this observation by the decision in *M. R. S. Mani v. District Magistrate, Mathurai*, A. I. R. (37) 1950 Mad. 162. This consideration, however, will be further examined while dealing with the grounds.

[16] It was urged that the grounds which were stated and furnished to the detenu were vague, indefinite and *mala fide*. A perusal of the statement of the grounds dated 13.6.50 clearly indicates that some of them were mere factual statements and it is the ground No. 6 that forms the gravamen of the statement of the said date. In my opinion, it is necessary to quote the grounds which were furnished to the detenu. They are as follows :

"(1) That a meeting of labourers was convened at Sabzmandi Bhopal on 18.2.1949 at 10 p. m., where you recited a poem inciting violence and death to capitalists ;

(2) That the District Magistrate, Bhopal had by notification banned all meetings in Bhopal but you disobeyed the said orders and addressed a meeting of labourers held at the Textile Mill gate on 30.3.1949 at 3.15 p. m. You were accordingly arrested and challaned under the provisions of the Bhopal Public Safety Act for the contravention of the said orders and sentenced to 3 months rigorous imprisonment on 24th April 1949.

3. That after your release you again took active part in the labour movements encouraging the labourers to indulge in subversive activities. At a meeting of the labourers held at Bhopal on the night of 15.8.1949 you recited another poem encouraging revolution as against law and order;

4. That on 1-9-1949 you joined and took active part in a procession of labourers organised for being led to the Chief Commissioner's residence at Lal Kothi. The same day, the labourers of the Textile Mill observed a token strike between 3.30 & 4.30 p. m. In between this time, you addressed the labourers inside the Mill area and exhorted them to continue the strike.

5. That you were therefore arrested on 4-9-1949 and detained under S. 3, Bhopal Safety Act for six months with a view to prevent you from acting in any manner prejudicial to the security of the State and the public order therein;

6. That the reasons for which you were detained on 4-9-1949 continued to exist even when you were released on 3-3-1950 and there was every likelihood that you would once again indulge in activities prejudicial to the security of the State and public order therein. All India Railway Strike was expected to commence on 9-3-1950 and it was apprehended that you would continue to organise and take part in activities subversive of law and order. With a view therefore to prevent you from acting in any such manner warrants under S. 3 of the Preventive Detention Act were issued against you on 7-3-1950 but you could not be arrested as you went underground immediately after your release till 5-6-50 when you were arrested.

2. You are further informed that you have a right to make a representation to me in writing against the detention order.

Sd/Chief Commissioner."

[17] It would appear that grounds Nos. 1 to 5 were obviously the grounds on which the previous order was passed. They are, however, liable to be examined in considering the order passed on 7-3-50 because in ground No. 6 it is stated that the reasons for which the detenu was detained on 4-9-1949 continue to exist even when he was released on 3-3-1950. In attacking ground No. 1, therefore, it is urged by the learned counsel of the petitioner that the words "Labourers" and "Capitalist" used in that ground are so vague that they do not indicate anything. It is said that everyone who works for his livelihood is a labourer while "capitalist" is after all a relative term. Reference is made to the two decisions of the Bombay High Court in *In re, Anant M. Hadeo*, A.I.R. (36) 1949 Bom. 95 and *Maniben Liladhar v. Emperor* A. I. R. (20) 1933 Bom. 65. It would however, appear that the first case is again liable to be distinguished from the case on hand as in the latter the labourers have been particularised viz: a meeting of labourers was convened at Sabzmandi, Bhopal, on 18-2-1949 at 10 p. m. In the circumstances, the case is clearly distinguishable from the Bombay case where it was only stated that "the detenu had been inciting the workers to commit acts of violence and thereby acting in a manner etc." It would also appear that under the Bombay Public Security Act, it was not merely the grounds but also the particulars which were liable to be furnished and it was, therefore, observed that

"The notice (as required under that Act) was vague and indefinite and that the particulars given were not such as to enable the detenu to make a representation."

[18] As regards the use of the word "capitalist," in my opinion, reference to the case of *Maniben Kara*, A. I. R. (20) 1933 Bom. 65 does not at all

help the contention as made before me. It must appear that that was a case of an offence under S. 153(A), Penal Code, and what has been observed in that case is that the word "capitalist" does not denote a definite class within the meaning of S. 153(A), Penal Code. I am clear that that test as required under the particular section of the Penal Code is not applicable to the case of ground No. 1. I would also add that whether the word "capitalist" is a relative term or not the fact stands that violence and death to any capitalist or the whole class of capitalists was obviously liable to serious objection. In the circumstances, I am clear that it cannot be accepted that the ground No. 1 was vague or that it could not convey to the mind of the detenu the activity which was prejudicial in the eyes of the then detaining authority.

[19] Ground No. 2 is obviously a mere factual statement and only indicates that the detenu had disobeyed the previous orders. It was urged that under the Constitution, a citizen has the right of freedom of speech and expression, and therefore he had a right to address a meeting of labourers. In my opinion, the significance of the ground has been misapprehended or at least misappreciated. As I have already stated it is not that the detenu had addressed a particular meeting on 30-3-1949 which constituted a ground for his present detention. It only indicates the mental attitude under which the detenu acted in the past and points out that he was prone to disobey the orders then passed, banning all meetings in Bhopal. It was urged that on this ground every congress-man who disobeyed the then orders was liable to be detained and that the present detention of the petitioner on that ground was nothing but a fraud on the Act. In my opinion, all the vituperative nature of the contention is knocked out at the bottom by the view which I have already expressed that it was not on this ground of his addressing a particular meeting then banned on account of which the present order was passed. I have only to repeat that the ground has been obviously stated to indicate the mental attitude of the detenu.

[20] Going over to the ground No. 3 it was urged that the words "subversive activities" were too vague and reference is made to the decision *In re Krishnaji Gopal* A. I. R. (35) 1948 Bom. 360 at pp. 363 & 364, *ibid*. It is urged that the same question as was asked by the learned Judge in the matter of sufficient precision conveyed by the above word can be asked in this case also. It must, however, appear that in the case on hand the ground No. 3 does not stop short at the words "subversive activities." It goes on further and points out that in a particular meeting the detenu recited a poem encouraging revolution as against law and order. The law as was applicable at that time has no doubt undergone a change but that change is only in so far as it was inconsistent

with the present law. Here again, in my opinion, the same observation can be made viz., that the ground indicates the mental attitude of the detenu as can be deduced from the above ground. In the circumstances, in my opinion, mere reference to the decision of the Bombay High Court *ibid* cannot avail the petitioner as it is liable to be distinguished in view of the latter portion of the ground No. 3 as pointed out above.

[21] Going to the ground No. 4, it deals with what the detenu did on 1-9-1949. It is said that he joined and took active part in the procession of labourers organised for being led to the Chief Commissioner's residence at Lal Kothi and that on that day the labourers of the Textile Mill observed a strike for an hour during which period the detenu addressed the labourers in the Mill area and exhorted them to continue the strike. In this case it must appear that it not stated in the ground that the strike was illegal; and in so far as the present position of every citizen is concerned, he has a right, under Art. (19) (1) (a), to freedom of speech and expression; under (b) to assemble peaceably and without arms; and under (d) to move freely throughout the territory of India, subject to Cls. 2, 3 & 5 of the Article, respectively. Article 19 provides for the protection of certain rights regarding freedom of speech etc. In the circumstances the fact that the petitioner took an active part in the procession of labourers etc. cannot be a proper ground for reasonable satisfaction of the detaining authority as late as 7-3-1950. It was urged by the learned Government Advocate that every strike, in so far as it was affected by the Bhopal Industrial Trades Disputes Act (No. VI) 1946, was illegal. I am not satisfied with the contention of the learned Government Advocate in this behalf. On 7-3-1950 as the ground did not state that the strike was illegal under a particular Act or Law it was bound to be considered as vague. The Bhopal Industrial Trades Disputes Act, 1946 can be even called to be inconsistent with the present law since the constitution came into force and that makes the most important and substantial difference in the conditions as obtained on 1-9-1949 and 7-3-1950. It would also appear that as far back as in 1942 when conditions in the country were very stringent under the British rule, during the war period, it has been observed by Horwill J in *In re Appalaswamy*, A. I. R. (29) 1942 Mad. 735 that

"Strikes and lock-outs, though clumsy and injurious are the only existing means of deciding trade disputes. The calling of a strike is not illegal."

In *Arun Kumar v. Province of Bihar*, A. I. R. (36) 1949 Pat. 236 it is observed that

"It is now recognised in labour legislation and practice that labourers may resort to strikes, legally conducted, for the redress of their grievances. Consequently, merely stating in the grounds for detention that the detenu was responsible for strikes in some collieries, without mentioning whether they were legal or illegal is not a ground of such precision or adequacy as to enable the

detenu to make a representation against the order of detention."

If such was the freedom or liberty to persons in India in those days it is needless to point out that it has been augmented by Article 19 of the Constitution. In my opinion, therefore, ground No. 4 could not be an adequate ground for reasonable satisfaction for the detention of the petitioner on 7th March 1950.

[22] Turning to the ground No. 5, it does not appear necessary to consider it as it is nothing but the factual statement as to what was done to the petitioner on 4th September 1950.

[23] As I have already said, ground No. 6 constitutes the gravamen of the grounds stated, and it is necessary to closely examine it in the light of the law applicable. It was said that the reasons for which the petitioner was detained on 4th September 1949 continued to exist when he was released on 3rd March 1950. I have examined the reasons which existed on 4th September 1949 and as I have pointed out they appear to have been stated over again in the grounds for the present detention merely to indicate the mental attitude of the petitioner. To my mind it was impossible to gauge the mental attitude of the detenu as it existed between 3-3-50 and 7-3-50 merely by its comparison with that obtained six months before, early in September 1949. It cannot be said with confidence that human mind continues to be the same. Though there are changes in the psychology of every human-being, a human mind is still, in spite of all the advancement of Science remains as inscrutable as ever. In the circumstances it is difficult for me to hold that the detenu's mentality continued to be the same and the grounds which existed in September '49 could be proper and adequate grounds for the reasonable satisfaction of the detaining authority as late as on 7th March 1950.

[24] It is here that the consideration which was deferred in para 15 of this order has to be examined in detail. It must appear that no activities of the petitioner between the 3rd and 7th of March 1950 which were found to be prejudicial or objectionable have been stated in these grounds so that it could be possible to examine them and consider if the grounds, based on such activities could be adequate and sufficient for the reasonable satisfaction of the detaining authority. It is no doubt true that it has been stated in para 15 of the order that the detaining authority could take into consideration the proximate and immediate past of the detenu while passing an order of detention, but in my opinion, it is only the immediate past, the antecedents and the history of the detenu, that alone could be taken into consideration only if there be nothing between that immediate past and the order of detention. In the case on hand, it was more than six months that had elapsed since the time

the petitioner had given grounds for his detention, and during this period of more than six months all his activities were prevented by his detention. As I have observed, if after his release the petitioner had commenced activities prejudicial to the maintenance of public order or the security of the State, then while considering such activities his antecedents also could be taken into consideration by the detaining authority for its reasonable satisfaction. In the absence of any statement of his activities in the grounds, therefore I cannot persuade myself to hold that merely the past mental attitude of the petitioner could afford a ground for such reasonable satisfaction of the detaining authority.

[25] Examining the ground further it is stated that there was "Likelihood that the petitioner would once again indulge in the activities prejudicial to the security of the State and public order therein." This "likelihood" obviously depended upon not the activities of the detenu between 3-3-50 and 7-3-50 but banked merely on the mental attitude of the detenu as obtained more than six months before the order was passed. In my opinion after what I have stated, it is difficult to hold that such mere "likelihood" could afford a proper ground for the reasonable satisfaction of the detaining authority which was essential before the order was passed.

[26] In my opinion, examining the ground still further, it appears that the consideration of the existence of this "likelihood" was based not merely on the conditions or the reasons as existed on 4th September '49 but also on a certain apprehension which has been expressed in the next sentence of the ground, which states that "All India Railway strike etc. It was apprehended that the petitioner would continue to organise and take part in..... etc..... order" It was urged that the expected railway strike did not come off and in fact was called off before 7th of March 1950. There is nothing on record except the affidavit of the petitioner dated 29th September 1950 in support of this allegation of fact. The affidavit of the officiating Home Secretary dated 3rd October 1950 filed on record does not contradict this statement of the petitioner. Whether, however, this All India Railway strike was called off or not before the date of the order impugned, it would be worthwhile to examine the mind of the detaining authority as obtained on 7th March 1950 in the matter of its reasonable satisfaction. While dealing with the provisions of the Bombay Public Security Measures Act (VI of 1947) it has been observed by a Bench of the Bombay High Court in *In re Shoilen Dey*, A. I. R. (36) 1949 Bom. 75) that

"emphasis is not so much on the accuracy, or on the nature or extent of the error; the emphasis is on the state of mind of the detaining authority. If the state of the mind of the detaining authority discloses that he

has been casual in his approach and that he has not applied his mind with that diligence which is necessary when the question is of taking away the liberty of a subject, the Court will certainly interfere and will set at liberty the detenu arrested by the order of the detaining authority."

This in my opinion, lays down the principle for examination of the grounds for the detention of a citizen. In *In re Bhaurao Karabhari*, A. I. R. (37) 1950 Bom. 126 it is observed that "any vagueness in the grounds furnished was evidence of vagueness of the mind of the detaining authority" In *Ram Bilas Gupta v. Rex*, A. I. R. (36) 1949 ALL 748, dealing with the U.P Maintenance of Public Order (Temporary) Act (IV (4) of 1947) it is observed that

"If in the opinion of the Court the grounds supplied are vague, indefinite and insufficient the Court must hold that further detention is illegal or improper."

It is thus obvious that the grounds are liable to be examined not with a view to ascertain their existence as a fact but with a view to examine the state of the mind of the detaining authority.

[27] Bearing this principle in mind, therefore, when the sentence states "all India Railway strike etc. . . . Order," it would appear that the detaining authority had a mere apprehension (not arising out of the activities immediately prior to the detention order) that "the petitioner would continue to organize. . . . etc. . . . The synonyms for apprehension are fear and dread. The idea common to these words is expectation of future evil. These synonyms are discriminated in "Synonyms Discriminated" by the late Charles John Smith, M. A. of the Balliol College, Oxford. It is stated "A faint emotion is expressed by apprehend, a stronger by fear and a stronger still by dread. Apprehend denotes generally an anticipation and sometimes an anticipation of evil. Fear and dread are applicable not only to events but directly to persons, which apprehend is not." It would, thus appear that mere apprehension denotes the smallest mental emotion in the matter of a possible future evil. The question, therefore, is whether such smallest mental emotion could afford an adequate and definite ground for a reasonable satisfaction, to the detaining authority, which was essential before passing of the order impugned. I need not repeat that in the absence of the activities of the detenu between 3rd and 7th March 1950 such mental emotion of the smallest degree could not create the requisite reasonable satisfaction.

[28] It must also appear that the grounds of the order of detention are to be disclosed to the person affected by the order for affording him an opportunity of making representation against the order. Examining the grounds therefore, it is difficult to find that it was possible for the detenu to comment or contradict the statement of the detaining authority, in the matter of its apprehension. To my mind, therefore, the grounds as might have been applicable in September 1949 and

reiterated before the passing of the order were so vague and indefinite that it is difficult to hold that they afforded the requisite reasonable satisfaction to the detaining authority. That being so, the very essence of the order, under S. 3(1)(a)(ii), Preventive Detention Act 1950, was, in my opinion, absent before the order impugned and the detenu is entitled to be released from his detention.

[29] I therefore direct that the petitioner be released.

V.B.B.

Detenu released.

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SATHAYE J. C.

Laxmichand and another — Applicants v. Abdul Gaffar — Non-applicant.

Civil Revn. No. 80 of 1951, D/- 21-2-1951.

Civil P. C. (1908), S. 95, S. 115, O. 38, R. 6 (2); O. 43 R. 1 (q)— Conditional order under O. 38, R. 5 for attachment before judgment — Security furnished — Attachment not effected — Application to get order set aside and for damages — Damages refused but security discharged — Revision does not lie as order is one passed under O. 38, R. 6 (2) (and not S. 95) and is appealable.

During the pendency of a suit for eviction and rent the plaintiff applied for attachment before judgment of the defendant's property, under Order 38, Rule 5. A conditional order was passed ordering attachment of the property on failure to furnish security. The defendant furnished the security, but applied under S. 95 Civil P. C. for damages alleging that the grounds on which the plaintiff's application was filed, were insufficient and not true. He also claimed that the security be discharged. The Court rejected the defendant's application for damages under S. 95, Civil P. C., but discharged the security furnished by him and awarded costs against the plaintiff. In revision by the defendant :

Held (i) that as no attachment was ever effected, an application under S. 95 could not lie, though one under O. 38, R. 6 (2) did lie, as he had furnished the required security. In this view the order of the Court was obviously passed under O. 38 R. 6 (2), (Para 3)

(ii) As the defendant, as a party aggrieved by an order under O. 38, R. 6 could go in appeal under O. 43, R. 1(q), no revision could lie. (Para 4)

Anno. Civil P. C., S. 95, N. 3; S. 115, N. 8; O. 38, R. 6, N. 1, 3.

Laxmi Narain Jemni — for Applicants; Mohamed Omar — for Non-applicant.

Order.—This is plaintiff's application to revise the order dated 15-9-50, passed by the Subordinate Judge, Bhopal in suit No. 136 of 1950-51, rejecting the defendant's application for damages under S. 95 Civil P. C., but discharging the security furnished by him and awarding a sum of Rs. 15 as costs against the plaintiff.

[2] The plaintiffs brought a suit for eviction of the defendant from a shop and for recovery of a sum of Rs. 1,770 as arrears of rent. During the pendency of the suit the plaintiffs applied for attachment before judgment of the defendant's property, under O. 38, R. 5 as the defendant was said to be disposing of or removing his property from the shop and on 10-7-50 a conditional order

was passed ordering attachment of the property on failure to furnish security. The defendant furnished the security, but applied under S. 95, Civil P. C. for damages alleging that the grounds, on which the plaintiff's application was filed, were insufficient and not true. He also claimed that the security be discharged. The Court, after inquiry, passed the order dated 15-9-50 as noted above.

[3] A preliminary objection to the tenability of the application or revision is taken by the non-applicant urging that an appeal to the Court of the District Judge, under O. 43, R. 1 (q), lay and not revision could lie and it be dismissed. The point for determination, therefore is whether a revision lies or an appeal lay to the Court of the District Judge. In my opinion, the contention of the non-applicant must succeed. It must appear that the application of the plaintiffs was obviously filed under O. 38, R. 5, Civil P. C. and the Court passed the order under O. 38, R. 6 (2) of the Code. Under the latter,

'Where the defendant showed cause or furnished the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn or make such other order as it thought fit.'

In the circumstances of the case, the Court obviously thought and decided that the grounds, on which the attachment before judgment was claimed, were not sufficient and therefore thought fit to discharge the security. In the circumstances the order of the Court was obviously passed under O. 38, R. 6 (2) of the Code and not merely on the application under S. 95, Civil P. C. It would appear that an application, under that section could lie only where an arrest or attachment has been effected or temporary injunction granted and though the defendant described his application as under S. 95, Civil P. C., it was really an application under O. 38, R. 6 (2) of the Code as he had furnished the required security. The order of the lower Court, therefore, as stated above, was clearly under the other provision and not under S. 95, Civil P. C.

[4] It would then appear that a party, aggrieved by an order under O. 38, R. 6 of the Code, could go up in an appeal under O. 43, R. 1 (q) of the Code. In the circumstances the revision petition cannot lie, but an appeal lay to the Court of the District Judge as the order has been passed by a Subordinate Judge. That being so, this revision petition is liable to be dismissed on the preliminary objection itself.

[5] It was urged by the learned counsel for the applicants that the defendant having applied under S. 95, Civil P. C., it was wrong for the Court to discharge the security furnished by the defendant and as such had exercised the jurisdiction not vested in it by law or to have acted in the exercise of its jurisdiction with material irregularity and therefore, a revision, under S. 34 Bhopal and Vindhya Pradesh (Courts) Act, was tenable. It would, however, appear that it has been already

pointed out that though the defendant claimed damages, the real object of the application was to get an order, under O. 38, R. 5 of the Code set aside. As I have already shown, no attachment was ever effected and as such an application, under S. 95, Civil P. C., could not lie, though one under O. 38 R. 6 did. It is also obvious that under O. 39, R. 6 (2) of the Code the Court had jurisdiction to pass an order as it thought fit and in the case on hand it has done so and as I have pointed out, the remedy of the applicants was by an appeal and not by a revision petition.

[6] The result is that the revision petition is dismissed with costs and the applicants are ordered to pay the costs of the non-applicant in this revision. Pleaders' costs will be Rs. 15 for each side.

V.B.B.

Revision dismissed.

A. I. R. 1952 Bhopal 15

SATHAYE J. C.

Durgadas — Applicant v. Ibrahim Ali and another—Non-Applicants.

Misc. Civ. Case No. 13 of 1950-51, D/- 22-2-1951.

(a) Civil P. C. (1908), O. 47, R. 1 — Incorrect finding by Court.

Even if the Court has arrived at an incorrect finding it cannot be a ground for review.

Chitaley's Civil P. C. cited with approval. [Paras 4, 7]

(b) Civil P. C. (1908), O. 47, R. 1 — Other sufficient reason—New points.

Where the review is nothing, but an attempt to usher in facts which were never pleaded nor stated it cannot be allowed.

Chitaley's Civil P. C. cited with approval.

[Paras 6 and 7]

Anno. C. P. C., O. 47, R. 1, N. 16b.

G. P. Jaiswal—for Applicant; Mohmed Yacoob—for Non-Applicants.

Order. — This is respondent's application for review of the judgment and decree in first appeal No. 106 of 1950-51, dated 18-9-1950 of this Court.

[2] Seth Durgadas filed a suit for pre-emption of a sale of a house to Haji Ibrahim Ali and another on the ground that his house was contiguous to the one sold to them. The original Court decreed the claim holding that though there was a narrow lane between the two houses, which were thus not contiguous, it was owned by the vendors and was also sold to the defendants and, therefore, at least the house could be said to be contiguous on that ground. In appeal it was held that this finding was beyond the pleadings of the parties and in view of the intervening lane between the two houses they were not contiguous and, therefore, this alone being the basis of the claim, it could not succeed and the appeal was allowed and the suit was dismissed.

[3] In support of the application for review, it is urged that the lane was only $1\frac{1}{2}$ feet wide and this fact, and that the eaves water from both the houses was carried by it, were overlooked by this Court in deciding the appeal; that

the narrow lane could be owned either by the plaintiff or by the vendors or jointly and thus the two houses were contiguous and this consideration was also overlooked and, therefore, there was an error on the face of the record.

[4] The point for determination, therefore, is whether any material on record of the suit was overlooked in the judgment in appeal and, therefore, the latter is liable to be reviewed. It would appear that the question of contiguity of the two houses has been considered at length in the appellate judgment. Contiguity of the two houses was claimed on certain facts stated in the reply of the plaintiff on 16-2-1949. It is now urged that the reply was wrongly interpreted as in this reply the plaintiff had stated two basis of the claim, viz., the presence of *Ab Chak* lane and contiguity of the two houses. For one thing I am not prepared to accept that two basis were stated for the claim and secondly even if the Court had arrived at an incorrect finding, it cannot be a ground for review.

[5] An attempt is now made to elaborate the meaning of contiguity and reference is made to the Law Lexicon. In my opinion, all this could be and was urged in the appeal and has been even considered in the judgment. Reference need be only made, in this connection, to paras 7, 8 and 9 of the appellate judgment. I would also point out that there could be no review even if the Court had wrongly decided an issue. The judgment is perfectly clear and makes reference to all the pleadings and the contention, that certain part of the pleadings has been overlooked, falls to the ground.

[6] A perusal of the suit record and the appellate judgment clearly shows that all the pleadings were minutely examined and considered. The presence of the alleged lane between the two houses was also noticed and considered in the light of the pleadings. In this connection para. 9 of the appellate judgment may be referred to. The present contention, that the lane was jointly owned or owned by one or the other of the parties, was never made in the pleadings as has been clearly pointed out in the judgment in the appeal and the application for review appears to have been only sought to usher in what was not pleaded or stated on record. I am, therefore, clear that there could be no review on this ground also. It would also be necessary to point out that the claim was not based on the basis that there was an easement to drain eaves water on the lane and it was common to both the houses. The review, therefore, appears to be nothing, but an attempt to usher in facts which were never pleaded nor stated.

[7] It is unnecessary to refer to all the cases cited by Chitaley in the Civil P. C., (4th Edn., vol. III), p. 2240. It has been noted that where the review is asked for to enable the applicant to raise points which he could and ought to have

raised at the former hearing, no review could be allowed and so also where the Court has proceeded at a wrong exposition of the law or has wrongly decided on a question of law.

[8] In view of these circumstances, therefore, no review as sought can be allowed and the application is liable to be dismissed. The application is accordingly dismissed with costs and the applicant is ordered to pay the costs of the non-applicants. Pleaders' fees in the application will be Rs. 30 for each party if certified.

D.H.

Application dismissed.

A. I. R. 1952 Bhopal 16

SATHAYE J. C.

Abdul Qadir—Petitioner v. The Custodian of Evacuee Property, Bhopal State and another—Opponents.

Misc. Civil Case No. 2 of 1951, D/- 27-2-1951.

(a) Constitution of India, Art. 226 (1) — "For any other purpose." — Meaning — Jurisdiction of Judicial Commissioner's Court to issue writs.

Applying the principle of *ejusdem generis* to the expression "for any other purpose", it would appear that the generality of this expression is restricted by the preceding expression "for the enforcement of any of the rights conferred by part III". The expression limits the jurisdiction of the Judicial Commissioner's Court of Bhopal to issue only the writs as mentioned under Art. 226 only for the enforcement of any of the rights conferred by Part III or for any other ancillary purpose. Consequently an application for issue of a writ of *certiorari* to the Custodian General of Evacuee Property, New Delhi and a writ of prohibition to the Custodian of Evacuee Property of Bhopal, being outside the scope of Art. 226, the Judicial Commissioner's Court of Bhopal has no jurisdiction to entertain and decide it. A. I. R. (36) 1949 Bom. 277 and A. I. R. (37) 1950 Bom. 363, (36) 1949 Bom. 277 and A. I. R. (37) 1950 Pat. 387, *Rel. on*; A. I. R. (29) 1942 Cal. 343, *Ref.* [Para 11]

Anno Civil P. C. Appendix III, Constitution of India Art. 226, N. 5.

(b) Civil P. C. (1908), S. 9—Special tribunal having special jurisdiction to decide matter—Civil Court's jurisdiction.

If the special tribunal has special jurisdiction to decide a matter and the Civil Court's jurisdiction is barred then the Civil Court cannot examine how the tribunal has decided it, whether rightly or wrongly. If the special tribunal has jurisdiction to decide the matter, but has done so wrongly even then the Civil Court has no jurisdiction. If the tribunal decides the matter arbitrarily and not according to law then, even though the Civil Court's jurisdiction is barred still it can entertain the matter as if the tribunal's decision is non-existing. The question, whether the special tribunal had jurisdiction to decide the matter or whether it had done so arbitrarily, can be examined by the Civil Court. A. I. R. (28) 1941 Nag. 226, *Foll.* [Para 13]

Anno Civil P. C., S. 9, N. 53, Pts. 2 & 10.

(c) Constitution of India, Art. 226 (1)—Application for issue of writ of *certiorari* on Custodian General, Evacuee Property—Bar of jurisdiction — (Obiter) — Administration of Evacuee Property Act (1950), Ss. 4, 28 and 46.

The jurisdiction of the High Court to entertain an application for the issue of writ of *certiorari* to the Custodian General and a writ of prohibition to the Custodian of Evacuee Property is not barred by Ss. 4,

28 and 46 of the Administration of Evacuee Property Act: *Case law discussed.* [Para 17]

Anno Civil P. C. Appendix III; Constitution of India, Art. 226, N. 13.

Seth and Sonpar — for Petitioner, Ramchand Rupchand—for Opponents.

Cases referred to:—

(Arranged in order of Courts, and in the Courts chronologically. List of foreign cases referred to comes after the Indian Cases).

('50) Misc. Civil Case No. 9 of 1950 (Bhopal) [Pr. 9]

('50-51) Misc. Cri. Case No. 78 of 1950-51 (A. I. R. (39) 1952 Bhopal 1) [Pr. 9]

('49) A. I. R. (36) 1949 Bom. 277; (I. L. R. (1950) Bom. 1) [Pr. 7]

('50) A. I. R. (37) 1950 Bom. 363; (52 Cri. L. J. 120 F. B.) [Pr. 7]

('42) A. I. R. (29) 1942 Cal. 343; (I. L. R. (1942) 1 Cal. 211) [Pr. 11]

('41) A. I. R. (28) 1941 Lah. 294; (I. L. R. (1941) Lah. 524 F. B.) [Pr. 16]

('41) I. L. R. (1941) Nag. 279; A. I. R. (28) 1941 Nag. 226 [Prs. 13, 14]

('50) A. I. R. (37) 1950 Pat. 387; (51 Cri. L. J. 1509 F. B.) [Pr. 10]

('28) A. I. R. (15) 1928 Rang. 31; (5 Rang. 675) [Pr. 10]

('40) A. I. R. (27) 1940 Rang. 84; (1940 Rang. L. R. 325 S. B.) [Pr. 15]

(1906) 2 K. B. 501; (75 L. J. K. B. 745) [Pr. 15]

(1910) 2 K. B. 165; (79 L. J. K. B. 595) [Prs. 14, 15]

Order.—This is an application under Art. 226 of the Constitution for issue of a writ of *Certiorari* to the respondent 2, the Custodian General of Evacuee Property, New Delhi, and a writ of prohibition to the respondent 1, the Custodian of Evacuee Property of Bhopal.

[2] The facts stated by the petitioner are briefly as below: One Syed Amjad Ali who was a resident of Lahore (now in Pakistan) owned some machinery, mercury lamps and other property at Bhopal. He sold the above specified items of property to the petitioner under three sales, between 27-11-47 to 14-2-48, in all for Rs. 90,405 and placed him in possession. After the Administration of Evacuee Property Ordinance (No. XII [12] of 1949) was passed the properties were sought to be declared as evacuee property and the petitioner filed an application contesting the intended declaration and in the alternative prayed for confirmation of the sales.

During the pendency of the above application with the Custodian of Bhopal, another Ordinance No. XXVII [27] of 1949 was passed and the petitioner applied under that Ordinance. One Mr. Mathur, who was then the Custodian of Evacuee Property, Bhopal, inquired into the application and confirmed the sales under S. 38 of the latter Ordinance, on 26-12-49 subject to a deposit of Rs. 500 as administration charges which being deposited on 4-1-50 the properties were released and delivered to the petitioner.

[3] Mr. Mathur ceased to hold the charge in January 1950 and the present Custodian Mr. Nair, on 24-4-50 filed an appeal to the Custodian General against the above order of Mr. Mathur and also an application under S. 5, Indian Limitation Act for condonment of the delay in filing

the appeal. The Custodian General, after hearing the petitioner and relying on some record of a departmental inquiry and also other documents, passed an order on 14-12-50 allowing the Custodian's application under S. 5 and also the appeal and thus set aside the order of Shri Mathur and remitted the case for a fresh decision on merits to the very Custodian Mr. Nair who had gone up in appeal.

[4] It is urged that:

(a) the Custodian General illegally examined the record of the departmental inquiry and other papers unconnected with the case and prepared without notice to the petitioner and thus his order was without jurisdiction, opposed to the canons of natural justice and in total disregard to the law and procedure;

(b) that the Custodian of Bhopal had no right to appeal against his own predecessor's order;

(c) that the memo of appeal bore no court-fee which was provided for;

(d) that the appeal was barred by time and the application; under S. 5, Limitation Act, was not tenable and the grounds in its support were accepted as true without evidence in the presence of the petitioner;

(e) that the Custodian General could refer to the grounds only on record of the inquiry and had no jurisdiction to go beyond it;

(f) that the Custodian General's reference to the revisional powers under S. 27 of the Ordinance was irrelevant, and without notice and the use of such powers by him was arbitrary;

(g) that the Custodian General's reliance, on a statement recorded behind the back of the petitioner after the inquiry, was illegal, against the law of evidence and canons of natural justice and provisions of law and procedure as found in O. 41, Civil P. C., which was applicable;

(h) that the Custodian General's use of personal knowledge about Mr. Mathur's visit to the office was illegal exercise of his jurisdiction.

It is thus urged that the petitioner suffers from a grave miscarriage of justice and it was a fit case for issue of one of the high prerogative writs of *certiorari* or prohibition as otherwise the petitioner had no other remedy. It is also urged that the property affected was at Bhopal and the Custodian General exercised his functions within the jurisdiction of this Court and, therefore, this Court had jurisdiction to issue these writs.

[5] The non-petitioners filed a reply and took preliminary objections to the tenability of the petition and the following points for determination arise as preliminary issues on the said contentions or objections viz.:

"(1) Whether this Court has no jurisdiction to entertain and decide the petition on the grounds:

(a) that the respondent 2, the Custodian General resides and has his office at Delhi beyond the jurisdiction of Bhopal;

(b) that the petition is outside the scope of Art. 226 of the Constitution;

(c) that under the Administration of Evacuee Property Act this Court's jurisdiction is barred."

[6] As the contention in sub-cl. (b) goes to the very root of the tenability of the petition, it is taken up first as in my view of it succeeds, it may not be necessary to enter into the other two contentions in sub-cl. (a) and (c). The petition is filed under Art. 226 of the Constitution which need not be reproduced. The article lays down the power of High Courts to issue certain writs for the enforcement of any of the rights conferred by Part III and for any other purpose.

It may be pointed out that the petition is not filed for enforcement of any of the rights conferred by Part III of the Constitution. A passing reference is made by the petitioner at the end of Para 8 of his petition suggesting that there was a serious inroad on his fundamental right to property involved in the order complained against. No reference to any fundamental right or even the articles in Part III was made in the argument and there was no suggestion or contention with reference to this passing mention of such rights.

[7] The question, therefore, boils down to the meaning of the expression "and for any other purpose." Reference is made, by the learned counsel for the petitioner, to the decision in *P. V. Rao v. Khushaldas S. Advani*, A. I. R. (36) 1949 Bom. 277. In my opinion, the decision does not deal with the question of the jurisdiction, but merely lays down the principles on which a writ of *Certiorari* can be issued without laying down the scope of an application under Art. 226 for the enforcement of the fundamental rights under Part III of the Constitution. Reference is then made to the decision in *Jeshingbhai Ishwarlal v. Emperor*, A. I. R. (37) 1950 Bom 363 (F.B.). The decision draws distinction between an executive or administrative order and a judicial or a quasi-judicial order and at p. 365 it is observed as below by Chagla C. J.:

"Now its jurisdiction has been extended to the whole State of Bombay. Further, its jurisdiction is not merely confined to the writs which it issued in the past, but power has been conferred upon it to issue directions, orders or writs for the enforcement of any of the rights conferred upon it to issue directions, orders or writs for the enforcement of any of the rights conferred by Part III which deals with fundamental rights. It is not possible to read "directions, orders or writs" as being *ejusdem generis* with what follows, because these "directions, orders or writs" refer to a larger category in which category is included writs in the nature of *habeas corpus*, *mandamus*, *quo warranto* and *certiorari*. The article further confers upon this Court the power to issue not only writs in the nature of various categories specified in that article, but those writs themselves, and further the article goes on to state that these writs or orders can be issued not only for the enforcement of fundamental rights but for any other purpose. It is clear to my mind that "any other purpose" was embodied in this article in order to remove any doubt that the High Court's jurisdiction to issue these writs was confined merely to the enforcement of fundamental rights because the High Court could issue a writ otherwise than for the enforcement of fundamental rights, and that

power of the High Court is saved and safeguarded by providing in Art. 226 that the writs can be issued not only for the purposes of enforcement of fundamental rights but also for any other purpose."

[8] It would, however, appear that this view is based on what is observed by the learned Chief Justice in an earlier paragraph of his learned judgment. On the same page in para 2 it has been observed:

"And in order to understand what the extent of the jurisdiction of this Court is we have got to look to the provisions of Article 226. Before I look to the provisions of that article, it is necessary to state what the jurisdiction of this Court was with regard to writs of *certiorari* and other writs. This Court had the jurisdiction to issue writs of *certiorari* and prohibition, but that jurisdiction was restricted territorially to the ordinary original civil jurisdiction of this Court. The Court had also the jurisdiction to issue writs in the nature of *mandamus* which fall under Section 45, Specific Relief Act, but the territorial jurisdiction was similarly restricted. The Court had also the jurisdiction to issue writs in the nature of *habeas corpus* under S. 491, Criminal P. C., and as far as that jurisdiction was concerned, the extent of that jurisdiction was the whole Province or State of Bombay."

It would thus appear that the view was based or influenced by the consideration of the jurisdiction of that High Court prior to the commencement of the Constitution. On the other side, however, it would also appear that this Court had, prior to the enforcement of the Constitution, no such jurisdiction as detailed in the portion of paragraph (2) as quoted above. In the circumstances, it is necessary to interpret the expression "for any other purpose" independently of the jurisdiction which the High Court at Bombay had to issue such writs and the above decision of the Bombay High Court has to be distinguished on that ground.

[9] So far as the view so far expressed from one of the benches of the Judicial Commissioner's Court, it would be found in the decision of Shri Tribeni Saran, Additional Judicial Commissioner, Bhopal in *Bharat Pictures v. State of Bhopal*, Misc. Civil Case No. 9 of 1950, at pages 8 to 10 where the learned Judge has referred to the above decision of the Bombay High Court and also of the Patna High Court. At page 9 of the above decision, the learned Judge has observed:

"I felt reluctant to differ from the view so ably expressed by the learned Judges in that case and I feel so even now to differ from the view expressed by the eminent Judges in the Bombay case, but I think I would not be true to my conviction if I fail to express my views for what they are worth."

He then quoted his decision in *Govindprasad Shrivastava v. State of Bhopal*, Misc. Cr. Case No. 78 of 1950-51, wherein the very same decision of the Patna High Court was cited before him. It is observed in that case:

"I should think that the words 'any other purpose' mean nothing more than any other purpose ancillary to the enforcement of any of the rights conferred by Part III. I am inclined to read the phrase 'for the enforcement of any of the rights conferred by Part III' with special emphasis on the word 'enforcement' and if

this is done for the interpretation of the words 'any other purpose' I believe the position will be perfectly clarified so as to mean that the words 'any other purpose' can not be divested from the word 'enforcement' with which they are inextricably bound. Moreover the use of the conjunctive word 'and' between the two phrases mentioned above further supports this view."

[10] In *Bagaram Tuoule v. State of Bihar*, A. I. R. (37) 1950 Pat. 387 it is observed:

"The correct interpretation is that the words mean 'for the enforcement of any legal right and the performance of any legal duty.' To that extent the words must be read *ejusdem generis*, which is the ordinary principle of construction."

Examining this observation, it would appear that the expression '*ejusdem generis*' means 'of the same kind'. In Byrne's Law Dictionary the meaning of this expression as quoted at page 32 of *K. K. S. A. L. Firm v. Maung Kya Nyum*, A. I. R. (15) 1928 Rang. 31 is that:

"It is a rule of legal construction that generally words following enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality."

[11] In *Mahammad Nabi v. Province of Bengal*, A. I. R. (29) 1942 Cal. 343 the meaning of the principle of '*ejusdem generis*' is explained. It is said that the '*ejusdem generis*' doctrine means that

"Where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words". At page 284 of Maxwell's Interpretation of Statutes Edn. 7th it is observed:

"It is, however, the use of a general word following one or more less general terms *ejusdem generis*, which affords the most frequent illustration of the rule under consideration But the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words. In other words, it is to be read as comprehending only things of the same kind as those designated by them unless, of course, there be something to show that wider sense was intended."

It would thus appear that applying this principle to the expression "for any other purpose", the generality of this expression is restricted by the preceding expression "for the enforcement of any of the rights conferred by the Part III" and agreeing with the view of my learned brother, the learned Additional Judicial Commissioner, as cited above I find that the expression limits the jurisdiction of this Court to issue only the writs as mentioned under Art. 226 of the Constitution only for the enforcement of any of the rights conferred by Part III or for any other ancillary purpose. This being so and the petition not seeking to enforce any fundamental right under Part III of the Constitution, it is outside the scope of Art. 226 of the Constitution and therefore this Court has no jurisdiction to entertain and decide it.

[12] In view of the finding on sub-cl. (b) of the preliminary issue the petition is liable to be dismissed and it is not necessary to examine the question in sub-cl. (a) and (c). It appears, however, reasonable that the question in sub-cl. (c) should be examined so as to dispel any doubt in

the matter of the jurisdiction of this Court in regard to the issue of a writ of *certiorari* or any other writ within the ambit of Art. 225 of the Constitution. It was urged that under the provisions of the Administration of Evacuee Property Act of 1950, the jurisdiction of a civil Court or any other Court is barred and reference is made to ss. 4, 23 and 46 cls. (c) and (d).

Section 4 lays down :

"The provisions of this Act and of the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law."

Section 28 is found in chap. 5 of Appeals, Review and Revision and lays down :

"Save as otherwise expressly provided in this Chapter every order made by the Custodian General, District Judge, Custodian, Additional Custodian authorised Deputy Custodian, Deputy Custodian or Assistant Custodian, shall be final and shall not be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding."

Section 46 lays down :

"Save otherwise expressly provided in this Act no civil or Revenue Court shall have jurisdiction."

(a) and (b)

"(c) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or

(d) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine."

This section appears in Chap. 7 on the miscellaneous matters.

[13] It is urged that the jurisdiction of a Civil Court and even of the High Court, to entertain any petition of any proceedings, is barred because of these provisions. Merely saying that the jurisdiction is barred because of these provisions cannot, in my opinion, avail the opponents in this case. In several laws and acts special tribunals are created with special jurisdiction to deal with certain matters and in most cases some such provisions, as referred to above in this Act, are found barring the jurisdiction of civil or any other Court and yet the question arises whether such jurisdiction is barred and if so, in what matters. In *Court of Wards Jiwindas Estate, Jabulpore v Seth Moolchand*, I. L. R. (1941) Nag. 279: A. I. R. (28) 1941 Nag. 226 a Bench of two Judges examined this question with reference to the Debt Conciliation Act, Central Provinces (C. P. II [2] of 1933) and it was held that

"When a tribunal is constituted by statute to exercise certain functions, a civil Court cannot interfere with those functions or treat an act done by the body as a nullity unless the civil Court has got some special supervising power such as by appeal, or unless the body has acted, while doing this act outside its powers. The Court cannot interfere if the tribunal has exercised *bona fide* the discretion entrusted to it, not influenced by extraneous or irrelevant consideration, and not arbitrarily or illegally. Acts which oust the jurisdiction of Courts or interfere with the common law rights of a subject are to be very strictly construed."

In my opinion, these observations lay down the general principles for application to the conten-

tions in the matter of the bar to the civil Court's jurisdiction by special statutory provisions. The observations appear to lay down the following rules: viz: (i) If the special tribunal has special jurisdiction to decide a matter and the civil Court's jurisdiction is barred then the civil Court cannot examine how the tribunal has decided it, whether rightly or wrongly. (ii) If the special tribunal has jurisdiction to decide the matter but has done so wrongly even then the civil Court has no jurisdiction. (iii) If the tribunal decides the matter arbitrarily and not according to law then, even though the civil Court's jurisdiction is barred, still it can entertain the matter as if the tribunal's decision is non-existing. (iv) The question, whether the special tribunal had jurisdiction to decide the matter or whether it had done so arbitrarily, can be examined by the civil Court.

[14] As regards the jurisdiction of the High Courts in the matter of issuing the various prerogative writs or analogous proceedings, the position cannot be better stated than by Farwell L. J. in *Rex v. Board of Education*, (1910) 2 K. B. 165 at p. 179 as quoted at page 289 in *Manager, Court of Wards, Jiwindas Estate, Jabulpore v. Seth Moolchand*, I. L. R. (1941) Nag. 279: A. I. R. (28) 1941 Nag. 226, *ibid* :

"If the tribunal has exercised the discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals."

I would only further refer to the discussion of this very question at pages 290 & 291 of the above case.

[15] In the matter of *Pyu Maung*, A. I. R. (27) 1940 Rang. 84 S. B. at page 85 it is observed :

"Whenever any person or body of persons is invested with legal authority to determine questions affecting the rights of subjects and has the duty in exercising that authority to act judicially he or they are subject to the controlling jurisdiction of the High Court of justice exercised in the writ of *certiorari*."

At the same page is found a quotation of the observations of Fletcher Moulton L. J. in *Rex v. Woodhouse*, (1906) 2 K. B. 501 and I do not consider it necessary to quote the learned Judge's observations as found at that page, as the crux of the question is found in the above dictum laid down by the Rangoon High Court. At page 85 of the same decision a quotation in *Rex v. Board of Education*, (1910) 2 K. B. 165 as found in the Nagpur case is again found in this case also. It

does not appear necessary, however, to pursue the matter as it is obvious that even if the civil Court's jurisdiction is barred by a provision in the special statute creating special tribunals to deal with matters and rights created under the statute itself, still the Civil Court has jurisdiction to examine the matter or the rights created by the statute, and the manner in which the special tribunal has arrived at its finding or its decision.

[16] In *K. L. Gauba v. Punjab Cotton Press Co., Ltd.*, A. I. R. (28) 1941 Lah. 234 a Full Bench of that High Court laid down :

"But a Court cannot merely by a wrong exercise of discretion or by a wrong construction of law confer jurisdiction upon itself to try a cause and hence when the question arises as between the special Court and the Court of general jurisdiction as to whether a cause of general jurisdiction as to whether a cause is within the jurisdiction of the special Court or the jurisdiction of the Court of general jurisdiction then the decision of the Court of general jurisdiction must override the decision of the Court of special jurisdiction."

In this view, then, the contentions of the petitioner, as made in the petition, are liable to be examined by this Court and in this aspect it cannot be said that the jurisdiction to entertain the petition of this Court is barred.

[17] As I have already said, the finding on sub-cl. (c) does not affect or discount the finding on sub-cl. (b). The question in sub-cl. (a) deals with only territorial jurisdiction of this Court and in my opinion, it is not necessary to enter into that question.

[18] The result of the finding on the question in cl. (b) of the preliminary issue is that this Court has no jurisdiction to entertain the petition and decide it as it is outside the scope of Art. 226 of the Constitution. The petition is, therefore, liable to be rejected. It is, therefore, ordered that the petition is rejected with costs and the petitioner is ordered to pay the costs of the non-petitioners 1 and 2. Advocates' fees will be Rs. 75 for each party.

V.R.B.

Petition dismissed.

A. I. R. 1952 Bhopal 20

SATHAYE J. C.

Gulam Dastgir and another, Appellants v. Pannalal and others, Respondents.

Misc. First Appeal No. 6 of 1950-51, D/- 14-2-1951.

(a) Limitation Act (1908), Art. 176 — Extension of time — Minor legal representatives — Civil P. C. (1908), O. 22, R. 3.

Where the application for bringing on the record the legal representatives of the deceased appellant is filed long after the

period of limitation has expired, the period of limitation is not saved by the existence of minors among the legal representatives.

(Para 4)

Anno: Lim. Act, Art. 176 N. 6; C. P. C., O. 22 R. 3 N. 8.

(b) Civil P. C. (1908), O. 22, R. 3; O. 41, R. 4 — Death of one of the appellants — Abatement of appeal.

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased, the whole appeal will abate, but if the lower Court's decree proceeds on a ground common to the deceased as well as to the survivor then the latter can under O. 41 R. 4 appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal. If the appeal succeeds, the success enures for the benefit of all including the deceased appellant or his legal representatives even if they are not on record. Case law Rel. on. (Paras 5, 6)

Anno: C. P. C., O. 22 R. 3 N. 23; O. 41, R. 4 N. 8.

Mohmed Yacoob and Md. Mohmed Ali, for Appellants; R. C. Rai, for Respondents.

Cases referred to:

- ('33) AIR 1933 All 733: (146 Ind Cas 511) (Pr 5)
- ('34) AIR 1934 Cal 703: (61 Cal 879) (Pr 5)
- ('33) AIR 1933 Mad 655: (146 Ind Cas 26) (Pr 5)
- ('41) AIR 1941 Pesh 36: (194 Ind Cas 365) (Pr 5)

JUDGMENT: In Civil Suit No. 2 of 1950-51 Nawab Akhtar and Gulamastgir sued Seth Pannalal and others for dissolution of partnership and rendition of accounts in the Court of the District Judge, Raisen. During the trial of the suit the plaintiffs applied for appointment of a Receiver of the property of the partnership. The learned District Judge, on 8-5-50 rejected the application. The plaintiffs Dastgir and Nawab Akhtar filed this appeal against that order.

(2) During the pendency of the appeal the appellant No. 1 Gulam Dastgir, on 26-9-50, informed the Court that the appellant No. 2 Nawab Akhtar had died a month before. The appeal was adjourned for filing an application for substitution of the legal representatives of the deceased. On 1-11-50 Gulam Dastgir, appellant No. 1 filed an application for bringing on record the legal representatives, but it being improper was rejected on 3-11-50. On 7-11-50, the legal representatives of the deceased appellant No. 2 filed an application for being brought on record, but it was only on 6-12-50 that they stated the date of the death of Nawab Akhtar to be 28-6-50. On 30-12-50, the respondents contended that the application was barred by time and that the whole appeal abated. The applicants contended that as some of them were minors, the application was within time and that at any rate the whole appeal could not abate.

(3) Issues were framed on these contentions & after arguments were heard, they are found as below:

Issues.	Findings
1. Whether the application for bringing on record the legal representatives of the appellant No. 2 is barred by time? If so, what effect?	It is barred by time.
2. Whether the presence of minors amongst the L. Rs. saves the period of limitation? If so, what effect?	It does not save the period.
3. Does the whole appeal abate in case the application aforesaid is barred by time? If not, what portion and to what extent?	The appeal does not abate as a whole.

REASONS FOR THE FINDINGS.

(4) 'Issues Nos. 1 and 2:' Order XXII of the Code of Civil Procedure lays down the law as applicable to the suits as also the appeals on the death, marriage and insolvency of parties. Rule 11 of the said Order of the Code makes it clear that the rules in so far as are applicable to suits are applicable to appeals also. On the death of a party to a suit or an appeal an application for bringing on record the legal representatives has to be filed within 90 days of the death of the said party, under Art. 176 of the Limitation Act. In the appeal on hand, it is now obvious that the appellant No. 2 Nawab Akhtar died on 28-6-50 and this date is not challenged by the respondents.

The very first application, which was filed for bringing on record the legal representatives, was filed on 1-11-50 i.e., long after the period of limitation had expired. The second application by the applicants-legal-representatives of the deceased appellant was filed on 7-11-50 which was equally so barred. The existence of minors amongst legal representatives does not make any difference in so far as the substitution of the legal representatives is concerned. In the circumstances, it is found that the application is barred by time and that the period of limitation is not saved by the existence of minors among the legal representatives.

(5) 'Issue No. 3': The question, however, is what the effect, of the failure of such application being filed within time, is the main question for decision being whether the whole appeal abates and if not, what portion. Under rule 4 of the Order XLI of the Code

"where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be."

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased, the whole appeal will abate, but if the lower Court's decree proceeds on a ground common to the deceased as well as to the survivor then the latter can, under this rule, appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of the appeal.

In 'MASHAHUR v. SUBHAN DIN', AIR 1941 Pesh 36, it is held that

"where a suit against several defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam in order to enable the plaintiffs to do so is decreed, the decision jointly affects all the defendants and if in appeal by them one of them dies and his legal representative is not brought on record within time, the appeal does not abate against all the appellants."

This decision follows a decision of the Allahabad High Court in 'JAMNA BHAGAT v. AUDH BEHARIMAL', AIR 1933 All 733 and a decision of the Calcutta High Court in 'SATULAL v. ASIRADDI', AIR 1934 Cal 703 and of the Madras High Court in 'CHENCHURAMAYYA v. VENKATASUBBAYYA CHETTY', AIR 1933 Mad 655. I am in respectful agreement with the observations and the decisions in the above cases and find that the appeal does not abate as a whole and can be heard even if there is only one appellant on record.

(6) The above decisions also lay down that if the appeal succeeds, the success enures for the benefit of all including the deceased appellant No. 2 or his legal representatives even if they are not on record. My finding, therefore, is that the appeal does not abate.

(7) Findings accordingly.

D.H.

Order accordingly.

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SATHAYE, J. C.

Kanhaiyalal, Appellant (Accused) v. State.
Criminal Appeal No. 34 of 1951, D/- 3-7-1951.

(a) Criminal P. C. (1898), Ss. 287, 342 — Non-compliance — Confessional statement — Admissibility as evidence against accused.

Accused questioned by committing Magistrate regarding his having made the confession but Sessions Judge omitting to question accused over again in the matter — Sessions Judge failing to question accused under S. 342 even regarding his previous statement in Committing Court — Record of examination of accused duly recorded by committing Magistrate tendered in Sessions Court but the same not read as evidence in Sessions Court as required under S. 287 — Omissions do not permit High Court in appeal to consider confessional statement as evidence against accused. (Para 9)

Anno : C. P. C., S. 287 N. 1; S. 342 N. 35.

(b) Penal Code (1860), S. 300 — Exception I and First proviso — Provocation not sudden and sought by accused himself.

The provocation, if any, must be not merely sudden nor only grave but must be both grave as well as sudden which alone gives the benefit to the culprit. The effect of such grave and sudden provocation, if any, must be the loss of self-control. If there was time enough to cool down and the accused afterwards avenges himself for the insult or offence given, he can hardly plead the extenuating circumstance as enacted.

(Held on facts that provocation was not sudden and further was sought by accused himself) Case law discussed. (Paras 11, 14) Anno: Penal Code, S. 300 N. 9, 14, 16.

(c) Penal Code (1860), S. 300, Exception 1—Provocation — Consideration of castes of accused and deceased.

The fact that the accused was a Brahmin and the deceased a barber cannot be taken into consideration in deciding whether the insult by the deceased had reasonably enhanced the degree of provocation. (Para 16) Anno: Penal Code, S. 300 N. 9.

Ramchand Panjwani, for Appellant; Ramchand Rupchand Bhambani, Government-Advocate, for the State.

Cases referred to:

- (29) AIR 1929 Lah 861: (30 Cri L J 1044) (Pr 11)
- (25) 8 Nag L J 56: (AIR 1923 Nag 251: 24 Cri L J 570) (Pr 14)
- (35) AIR 1935 Pesh 78: (36 Cri L J 939) (Pr 11)
- (36) AIR 1936 Rang 40: (37 Cri L J 410) (Pr 11)

JUDGMENT: The appellant Kanhaiyalal Brahmin of Mouza Sunheti, aged about 50 years has been convicted of an offence under S. 302, Indian Penal Code, by the Sessions Judge, Bhopal for having committed the murder of Mst. Gangabai Nain aged about 25 years of the same village, in the afternoon of the 5th of October 1950, at her house by a gun-shot and is sentenced to death. The learned Sessions Judge has also made a reference under S. 374, Criminal P. C. for confirmation of the sentence. This judgment will dispose of both the appeal and the reference.

(2) The case for the prosecution in brief was as follows: The appellant, his father, brother and son were residing in the family house, at mouza Sunheti, in separate portions. The appellant was not on cordial terms with the patelan of the village with whom he was at one time in service. His relations with the deceased Gangabai Nain were also not cordial as she was a partisan of the patelan. The appellant therefore did not like his young daughter-in-law, aged about 20 years, Mst. Ramrani alias Gayatri visiting the house of the deceased Gangabai. Gangabai had about a couple of months before the occurrence also set up Mst. Ramrani alias Gayatri (P. W. 2), on an offer of substantial reward of land, a pair of bullocks and money to accuse her father-in-law, the appellant of having outraged her modesty. The appellant had, therefore, prohibited Ramrani from associating with the deceased Gangabai or visiting her.

(3) On the 4th of October 1950 i.e., a day prior to the occurrence, the appellant had gone to the house of Gangabai in search of Ramrani and had inquired of Gangabai's husband, Malthu (P. W. 1) who had warned him not to go to his house in such inquiry and had threatened him. On the 5th October 1950, in the afternoon, the appellant left his house with a gun in his hand and went to the house of Gangabai to look for Mst. Gayatri and seeing her there pointed her out to Malthu to falsify him. He then went to Gangabai and asked her why she had called his daughter-in-law and said that she wanted to accuse him of a foul charge so as to throw him out of the village.

(4) At this Gangabai replied that the charge was true and that he had caught hold of his daughter-in-law's hand with an evil intention. The appellant suddenly fired a shot from his gun at Gangabai and the bullet struck her on her chest. He also tried to hit her with the gun after she fell down, but the gun struck against the roof of the house and broke. Gangabai died a few minutes later. The appellant then himself left for the Police Station, but was forestalled by Malthu (P. W. 1) who made the First Information Report.

(5) In his plea in the Sessions Court the appellant denied having shot Gangabai, but he admitted all the facts as stated above in the case for the prosecution and added that on the afternoon in question his brother Raghunanandan returned from their fields and asked him to go with the gun for watching the crops and stay there for the night. While he was leaving his house for the fields, his mother told him to send Gayatri back home from Gangabai's house where she had gone. He accordingly went there. On his way to his fields and finding her there, he asked her to go back and asked Gangabai why she had tutored his daughter-in-law to make a charge against him to which she insisted that it was true and therefore he lost his balance and self-control & fired a shot at Gangabai which killed her. On his side it was urged in the Sessions Court that his act amounted to, at the maximum, culpable homicide not amounting to murder as his case fell within the purview of exception No. I to S. 300, Indian Penal Code, as he committed the act in grave and sudden provocation. The learned Sessions Judge, on the evidence on record, found as a fact that the appellant shot at Gangabai with an intention to cause her death & she had died of it & had thus committed her murder. He held that the case did not fall within the exception and not finding any extenuating circumstance, sentenced the appellant to death.

(6) In appeal in this Court two points are pressed viz.: (1) that in the circumstances of the case the appellant had acted on grave and sudden provocation and was entitled to the benefit of exception No. I to S. 300, Indian Penal Code and (2) that in view of the provocation the sentence of death was not proper.

(7) The record of the case has been carefully perused and examined by me & there is no doubt that Gangabai, the wife of Malthu is dead and that her death was caused by a wound of a gun-shot fired by the appellant from his gun and that he did so with an intention to cause her death. The evidence of Gajadhar (D. W. 3) and Shriram (D. W. 1) clearly establishes that the appellant left his home with a gun in his hand. It is not impossible that he left home with an ultimate object of going to the fields, but it is also established by the evidence of Malthu (P. W. 1) and Mst. Gayatri (P. W. 2) that the appellant entered the former's house and bandied words with Malthu (P. W. 1) and scolded Mst. Gayatri and of his own accord questioned the deceased Gangabai and racked up the rankling in his mind regarding the accusation of his mis-behaviour with his daughter-in-law and when the deceased Gangabai replied to him, he fired a shot from his gun killing her a few minutes later. The

evidence, therefore, is more than enough to establish the above facts.

(8) The learned Sessions Judge has unfortunately recorded much of evidence from Mohammad Raqib (P. W. 3), Mohammad Azim (P. W. 4) and Nandlal (P. W. 7) which was wholly inadmissible. The evidence of Mohammad Raqib (P. W. 3) regarding the statement of Mst. Gayatri, under S. 164, Criminal P. C., was not admissible as she herself was placed in the witness-box and could depose to the facts recorded in the statement. The evidence of Mohammad Azim Khan, Sub-Inspector (P. W. 4) regarding what he had heard in the village and his conclusions was again inadmissible as nothing but hearsay or based on information which he had received and so is the case with the evidence of Nandlal (P. W. 7) regarding what the accused told the Police in his presence. Even excluding this inadmissible evidence however, the conclusions arrived at are not shaken.

(9) The learned Sessions Judge does not seem to have taken into consideration the confession of the appellant recorded by Mohammad Raqib, Magistrate, Second Class, (P. W. 3). A Government notification authorised the Magistrate to record confessions and there was nothing to prevent the Sessions Judge from considering the said confession. Curiously enough however, there has been a serious lacuna in the matter of the admissibility of the evidence as found in the confessional statement. It appears that the appellant was questioned by the Committing Magistrate regarding his having made the confession as found in Ex. P-2, but the learned Sessions Judge has omitted to question the appellant over again in the matter so that the latter was not given an opportunity to explain it. Another omission committed by the learned Sessions Judge is that he has failed to question the appellant under S. 342, Criminal P. C. even regarding his previous statement in the Committing Court. It is obvious that the record of the examination of the accused, duly recorded by the Committing Magistrate, was tendered in the Court of Sessions, but it does not seem to have been read as evidence in the latter Court as required under S. 287, Criminal P. C. These two omissions, therefore, do not permit this Court to consider the confessional statement, as found in Ex. P-2, as evidence for or against the appellant.

(10) The facts as stated above are not challenged & it appears to me unnecessary to dilate on that matter. I have referred to these defects in procedure followed by the learned Sessions Judge with a view to point them out to the Courts subordinate to this Court, so that they should avoid them.

(11) The first point for determination, on the contentions of the appellant in this Court, is whether the appellant's case falls within the purview of exception No. 1 to S. 300, Indian Penal Code. It must be remembered that the provocation, if any, must be not merely sudden nor only grave but must be both grave as well as sudden which alone gives the benefit to the culprit. The effect of such grave and sudden provocation, if any, must be the loss of self-control. If there was time enough to

cool down & the accused afterwards avenges himself for the insult or offence given, he can hardly plead the extenuating circumstance as enacted. It is difficult and almost impossible to lay down any hard and fast rule as to what amounts to grave and sudden provocation.

"What amounts to grave and sudden provocation may vary according to circumstances of each case and according to the general standard of self-control amongst the people of the class involved". '*NGA PAW YIN v. EMPEROR*', AIR 1936 Rang 40.

Any attempt in my opinion, to determine the existence or presence of grave and sudden provocation in a particular case on the authority of other cases, should be futile as the point has to be determined, as pointed above, on the circumstances of each case. At page 215 of *Law & Practice of Hurt & Homicide* by P. J. Rust, Second Edition, it has been observed that

"In judging the conduct of the accused one must not confine himself to the actual movement when the blow which ultimately proved fatal, was struck that is to say one must not take into consideration only the events which took place immediately before the fatal blow was struck."

This obviously suggests that provocation may arise at a particular moment of time and would be gradually aggravated reaching to a certain pitch when it suddenly becomes so grave as to cause loss of self-control in the accused. In this connection the learned counsel for the appellant referred me to a decision of the Lahore High Court in '*JAN MAHOMED v. EMPEROR*', AIR 1929 Lah 861. It is unnecessary to state all the facts of that case, but it appears that the accused was vexed and perturbed over the notoriously immoral life which his wife led and in the end, though he controlled himself for some time, lost his balance altogether when he protested against her conduct in disappearing from his bed-side & the wife in reply abused him in vulgar words. Another case of '*BHADUR v. EMPEROR*', AIR 1935 Pesh 78, is also cited in this Court on behalf of the appellant. In that case the deceased was having an intrigue with wife of the accused for a long time and used to sing provocative songs tantamount to declaration of his intrigue and in the end drove the accused to offence of killing him, by singing the song over again which touched the accused to the quick resulting in the fatal assault on the deceased. It was held that

"the mere fact that the accused had managed to control himself on previous occasions when provoked, was no reason for refusing to give him the benefit of exception No. 1 to S. 300, Indian Penal Code."

(12) In my opinion, however, these cases do not help the determination of the case on hand. It appears that these cases and various other ones of similar type did not involve an element which exists in this case and which falls within one of the provisos to the exception No. 1 under S. 300, Indian Penal Code. It may be safely conceded that a false accusation of the type which the deceased Gangabai had admittedly tutored Mst. Gayatri to make against the appellant could give grave provocation to

him, but as I have already said, the suddenness of such provocation was brought about by the appellant himself. It is obvious from the evidence of Gayatribai (P. W. 2) that the accusation had reached the ears of the appellant easily about a couple of months before the occurrence. He had been able to control himself throughout and though several opportunities could have afforded themselves to him, he had not taken any of them during the fairly long period. The maximum that he had done was to order his daughter-in-law Gayatri not to visit the house of the deceased Gangabai any more. This is apparent from the evidence of the father of the appellant, Shriram (D.W. 1). Before the appellant left his home, according to his own statement, his mother had asked him to send back Gayatri from the place of Gangabai where she had gone. There is nothing on record even to indicate that the appellant suddenly flared up and rushed to the house of Gangabai as the evidence of Gajadhar (D. W. 3) indicates that when questioned by him while on his way to the fields, the appellant had told him that he was going to his crops. It is thus obvious that he was not gripped by any provocation at the information of Gayatri being in Gangabai's house.

(13) It is in the evidence of Malthu (P. W. 1) and Gayatri (P. W. 2) that finding the latter in the house of Gangabai, the appellant asked her to go back and then under the condition of his mind as it existed then, he could have walked away or at the most seen to it that the girl went back home. But instead of doing so he raked up the rankling in his mind by inviting the deceased Gangabai to make the same accusation against him over again. He questioned the deceased why she had allowed his daughter-in-law to go to her and that she was plotting to defame him, and according to the appellant himself, Gangabai replied that it was really true and told him to do whatever he liked. It would thus appear that it is here that the case is liable to be distinguished from the other cases on this point as the provocation was sought by the offender himself. To put it in a nut-shell, it was the offender himself who invited the insult which, it appears, he had almost forgotten and it was as its reiteration or repetition that the appellant suddenly took up his gun and fired the fatal shot. In my opinion, therefore, the case of the appellant falls within the first proviso to exception No. I to S. 300, Indian Penal Code. It does not appear to be a case of continued or continuing provocation, but is a case of merely grave provocation and that too invited or sought by the appellant himself.

(14) In 'MANJU v. EMPEROR', 8 Nag L J 56: AIR 1923 Nag 251, it is held that

"the repetition of an accusation by A which the accused knew he had already made, on a challenge by him to do so, cannot be called sudden provocation, and provocation must be sudden as well as grave to reduce the intentional killing of another from murder to mere culpable homicide."

In that case the deceased made an accusation against the accused in a Panchayat that he was responsible for her illegitimate pregnancy. The accused was aware of this and did not

act at once on it. After some days he met Mst. Phundo, the deceased and questioned her about it and when she repeated it, he struck her with an axe of which the woman died later. It was held to be an offence of murder. In the case on hand, the appellant in spite of his being fully aware for a long time of the fact that the deceased had prepared a false accusation against him almost drove her to make it over again and insisted on it. In such circumstances, in my opinion, for one thing though conceding for a moment that the provocation was grave, it could not be sudden and for another even if so, it was nothing but sought by the appellant himself. In these circumstances, in my opinion, the benefit of exception No. I to S. 300, Indian Penal Code, cannot be given to the appellant and the offence otherwise clearly of murder cannot be reduced to the lesser offence of culpable homicide not amounting to murder. The conviction of the appellant, therefore, for an offence of murder under S. 302, Indian Penal Code is correct.

(15) The next point for determination then is whether the sentence of death was proper in the circumstances of the case. It is no doubt true that provocation has been held in several cases to be an extenuating circumstance. In the case on hand, however, the provocation was a story of the past and had even exhausted itself by the appellant's order to his daughter-in-law not to visit the place of the deceased Gangabai over again. Accepting for a moment, that he had merely an intention to correct his erring daughter-in-law and to send her back to her home, there was no reason for him to question the deceased Gangabai at all. In my opinion, it looks as if he took advantage of the presence of a gun in his hand and challenged the deceased by a question in the matter of the accusation and then with the possible loss of the balance of his mind, resulting from his own act, killed the woman then and there. He also tried to strike her after she fell down. In the circumstances, in my opinion, the appellant cannot be treated with any indulgence even in the matter of the sentence & deserved the normal penalty for an offence of murder and I am unable to find any extenuating circumstance on account of which the sentence of death should be reduced to transportation for life.

(16) A weak attempt was made to refer to the caste of the appellant being a Brahmin and the deceased being a barber & to contend that an insult of this type coming from a lower class should be held to have reasonably enhanced the degree of provocation. I cannot persuade myself for a moment to agree with such a contention as the question of caste of an accused and the deceased rarely comes into play in such cases. I, therefore, confirm the sentence of death passed by the learned Sessions Judge against the appellant and dismiss the appeal.

D.H.

Appeal dismissed.

A. I. R. 1952 BHOPAL 25**RADKE, A. J. C.**

Ghasi Ram, Appellant v. State.

Criminal Appeal No. 12 of 1952, D/- 1-7-1952.

(a) Evidence Act (1872), S. 118 — Child witness — Competency — Administration of oath — (Oaths Act (1873), Ss. 5 and 13.)

When young children are produced in law Courts as witnesses, it is the duty of the Presiding Officers to ascertain whether they are competent witnesses before they are examined and this can be done by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the Court thereof. In the case of village boys, it is all the more necessary on account of their low intelligence and power of perception. Under S. 5 of the Oaths Act, oath shall be administered only to those witnesses who may be lawfully examined which means that who can understand the sanctity of oath. A witness may be a competent witness and yet he may not be in a position to understand the sanctity of an oath. In such a case, S. 13 of the Act comes into play. A witness of this type can be examined without an oath and his testimony is as good as that of a witness to whom oath has been administered. (Para 9)
Anno: Evidence Act, S. 118, N. 2. Oaths Act S. 5, N. 1, S. 13, N. 1.

(b) Criminal P. C. (1898), Ss. 288, 423 and 439 — Discretion under S. 288, exercise of — Interference by higher Courts.

Section 288 gives discretion to a Sessions Judge to admit in evidence, the deposition of a witness examined in the committal Court in the presence of the accused, provided he has been examined in the trial Court. Such evidence, when transferred under this section to the record of the Sessions Court, becomes substantive evidence for all purposes. The discretion once exercised under S. 288 is final and it is not ordinarily open to higher Courts to interfere with it. The exercise of this discretion in a particular case is not governed by rules of evidence or procedure but is guided by experience, by observation of the demeanour of the witness and by other considerations not regulated by Acts of the Legislature. It is a matter of prudence and not of law. When the statement of a witness given in the committing Magistrate's Court appears to be, in all probability true and that given at the trial appears, to reason and experience, to be in all probability untrue, it is not imprudent on the part of the Sessions Judge to rely on the statement made in the committing Magistrate's Court. But the Sessions Judge should make a record of the fact that he admitted the former statement of the witness in preference to the latter and should give cogent reasons for doing so, in order to enable the superior Courts to scrutinise that the discretion was wisely exercised. The mere fact that the witness resiles from his former Statement, is no ground to admit his statement in preference to the statement in the

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Sessions Court. There are several other considerations to be taken into account while exercising this discretion. (Para 12)
Anno: Criminal P. C., S. 288, N. 5, 7; S. 423, N. 1; S. 439, N. 17.

(c) Criminal P. C. (1898), S. 288 — Former statement admitted in evidence — Transfer of deposition sheet necessary.

When the former statement is admitted in evidence before the Sessions Judge the deposition sheet should be placed on the record of the Sessions Court after having removed it from the record of the committal Court and exhibited in the case like other documents, and a note to that effect should be made in the order-sheet. (Para 12)
Anno: Cr. P. C., S. 288, N. 9.

(d) Criminal P. C. (1898), S. 288 — Prosecution to apply, under.

Ordinarily, the prosecution should apply for the exercise of the discretion by the Sessions Judge, under S. 288. (Para 12)
Anno: Cr. P. C., S. 288, N. 9.

(e) Criminal P. C. (1898), Ss. 164 and 364 — Procedure to be followed under S. 164 by Magistrates in recording confessions in detail laid down. (Paras 17, 19)

Anno: Cr. P. C., S. 164, N. 11; S. 364, N. 1.

(f) Criminal P. C. (1898), Ss. 164 and 533 — Irregularities in recording confession — Irregularities held fatal to admissibility of confession at trial. (Para 21)

Anno: Cr. P. C., S. 164, N. 11, S. 533, N. 8, 9.

(g) Criminal P. C. (1898), S. 423 — Finding of facts by lower Court in favour of accused — Finding not to be disturbed in appeal. (Para 25)

Anno: Cr. P. C., S. 423, N. 14.

(h) Penal Code (1860), Ss. 299 and 300 — Distinction between, pointed out. (Para 31)

Anno: Penal Code, S. 299, N. 1; S. 300, N. 1.

(i) Penal Code (1860), Ss. 299 and 300 — Intention.

A man's intention can only be gathered from his acts as every man is presumed to intend the natural consequences of his act. In deciding the question of intention, therefore, the nature of the weapon used, the part of the body on which the blow is given, the force of the blow and its number are some of the factors which assume importance. Death from a blow or blows on the head with a heavy sharpe-edged weapon is probably as a rule associated by the villagers with the breaking of the skull but the ignorance of the actual cause which will bring about the victim's death as a result of the blow or blows cannot affect the question of striker's intention. (Para 33)
Anno: Penal Code, S. 299, N. 2; S. 300, N. 3, 4.

(j) Penal Code (1860), Ss. 99, 100 and 300 — Right of private defence — Right held not exceeded.

If the accused exceeds his right of private defence, and kills his assailant though he could have caused lesser injury, the general exception may not apply. In that event the case is likely to fall under exception 2 to Section 300, Penal Code. But even if the accused were to cause more harm than is absolutely necessary in repelling the at-

tack it cannot be said that he exceeded the right given to him by law.

(Held case fell under S. 100 and not under S. 300 Exception 2.) 'Case law discussed'.

(Paras 28, 42, 45)

Anno: Penal Code S. 99, N. 6; S. 100, N. 1; S. 300, N. 21, 23.

Ramchand Rupchand, Govt. Advocate, for the State.

REFERENCES: Courtwar/ Chronological/ Paras
(29) AIR 1929 All 897 37
(69) 11 W R (Cr) 41 (Cal) 41
(27) AIR 1927 Lah 194: (28 Cri L J 252) 38
(48) AIR 1948 Lah 117: (49 Cri L J 300) 38
(05) 28 Mad 454: (3 Cri L J 43) 36
(36) ILR (1936) Nag 194: (AIR 1936 Nag 234: 37 Cri L J 1090) 41
(33) AIR 1933 Oudh 59: (34 Cri L J 243) 39
(40) AIR 1940 Pat 595: (41 Cri L J 520) 40

JUDGMENT: This is convict's appeal from Jail.

(2) The prosecution case is that one Gaffar had taken a contract of a coupe in the forest of Sarao and that the deceased Ali Ahmed was looking after the coupe on his behalf. The accused was employed to prepare charcoal. On 14-12-1950 Ali Ahmed went to the coupe and found that one of the stacks of wood was not fit to be lighted for preparing charcoal. He told the accused about it who stated that there was nothing wrong with the stack of wood. This led to the exchange of hot words between them. The deceased abused him and finally assaulted him with a stick. The accused, who had an axe with him, hit the deceased with it on his head and other places as a result of which he fell down dead. The accused then took to his heels.

(3) Information about this was given by the witnesses to Yusuf another Hawaldar of Gaffar who went to Raisen Station House and lodged a report (Ex. P-1) which was reduced to writing by Ali Hussain Sub Inspector (P. W. 1). He proceeded to the spot immediately and visited the scene of occurrence where the dead body of Ali Ahmed was lying uncared for and partially damaged by vultures. Inquest was held on the dead body by the Sub-Inspector and Ex. P-2 is the inquest report. The dead body was then despatched to Bhopal through Ajimuddin constable (P. W. 7) for postmortem examination. Dr. Bose (P. W. 10) performed the post-mortem examination and sent his report which is missing from the record. The doctor found four injuries on the dead body at the region of head and neck which were, in his opinion, caused by a sharp-edged weapon like an axe. Any one of those injuries was, according to medical opinion, sufficient to cause death.

(3a) The accused had absconded and a search for him was made. He was caught by villagers who took him to Salamatpur Station House where he was arrested on 19-12-50. He was then sent to Raisen Station House.

(4) On 23-12-50 the accused was produced, from Police custody, before a Magistrate who recorded his confession (Ex. P-11) which is on record.

(5) The accused, in his statement before the Committal Court, denied all facts and this statement was admitted in the trial Court though it was not exhibited by the Sessions Judge. In his trial, the accused admitted most

of the facts and added that the boys and females who were near the scene of occurrence snatched away the stick from the deceased after he had hit him with it and that thereafter he took out a pen-knife from his pocket and assaulted the accused with it. The first blow was parried with the axe. He again raised the knife to strike him but before he could do so, the accused hit him on the head with his axe two or three times in consequence of which he fell down. This he did in the exercise of the right of private defence.

(6) The trial Court disbelieved the story of the assault by the knife for want of evidence and held that the accused had the right of private defence and that in the exercise of that right he struck the deceased with an axe as he apprehended that grievous hurt would otherwise be caused to him. The Sessions Judge further held that the accused exceeded the right as he gave four blows to the deceased. He applied Exception (2) to Section 300, Penal Code, and found that the accused had committed an offence punishable under section 304, Penal Code (whether it was Part I or Part II is not stated). He was accordingly convicted under this section, and sentenced to seven years' rigorous imprisonment.

(7) The first question to be decided is whether the accused struck Ali Ahmed with an axe and killed him. (After discussing evidence His Lordship concluded).

(8) The evidence of the eye-witnesses coupled with the medical evidence and the examination of the accused unmistakably show that the accused hit the deceased with his axe and extinguished his life. But the prosecution relied on the confession of the accused (Ex. P-11) recorded under section 164, Criminal Procedure Code, by a First Class Magistrate. That confession was not duly recorded as I shall show later. I would like to comment on the testimony of the three eye-witnesses so far as the procedure is concerned, but I do not hold that any prejudice is caused to the accused by the irregularity committed by the Sessions Judge. Since the matter involves important rule of procedure, I would advert to it in order to guide the subordinate Courts.

(9) Umraosingh (P. W. 5) and Dhansingh (P. W. 6) are 14 and 13 years old respectively in the estimate of the Sessions Judge. They might be even younger or older actually. When young children are produced in law Courts as witnesses, it is the duty of the Presiding Officers to ascertain whether they are competent witnesses before they are examined and this can be done by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the Court thereof. In the case of village boys, it is all the more necessary on account of their low intelligence and power of perception. Under Section 5 of the Oaths Act, oath shall be administered only to those witnesses who may be lawfully examined which means that who can understand the sanctity of oath. A witness may be a competent witness, and yet he may not be in a position to understand the sanctity of an oath. In such a case, section 13 of the Act comes into play. A witness of this type can be examined without an oath and his testimony is as good as that of a witness to whom oath has been administered.

(10) In para 8 of his judgment, the Sessions Judge stated that the boy witnesses are "intelligent enough to understand the situation." This shows that he was aware of the fact that only those boys can be examined as witnesses who have attained sufficient maturity of understanding to speak what they had actually seen without being tutored. But his record does not show that he had taken precautions which he was bound to take before examining such witnesses. In the present case, no prejudice is caused to the defence by this irregularity of procedure for three reasons viz., (1) because the version of the boy-witnesses is corroborated by Punaji who speaks about their presence at the scene of occurrence, (2) because the accused admits their presence at the time of the assault and (3) because the Sessions Judge says that they are intelligent enough which means that they are competent witnesses.

(11) Punaji (P. W. 3) was examined in the committal Court and he was also examined in the Sessions Court. In the committal Court he stated that he was present at the time of the occurrence and that the accused had struck the victim two or three times with his axe. In the trial Court he resiled from his former statement and said that he did not know anything concerning the crime. When he was confronted with his former statement, he admitted having made it, but added a rider that he did so in terror of the Police. He did not say that the Police brought any influence to bear on him to make a statement to the Court. The Sessions Judge appears to have acted on the statement of the witness given in the committal Court and not on the statement as given before him. But he failed to follow the correct procedure enjoined by section 288, Criminal Procedure Code. It is, therefore necessary to point out to him how he should have proceeded in the matter.

(12) Section 288, Criminal Procedure Code, gives discretion to a Sessions Judge to admit in evidence, the deposition of a witness examined in the committal Court in the presence of the accused, provided he has also been examined in the trial Court. Such evidence, when transferred under this section to the record of the Sessions Court, becomes substantive evidence for all purposes. It means that the evidence recorded at the trial is replaced by the evidence recorded in the committal Court. Great responsibility lies, therefore, on the Sessions Judges in resorting to the discretion given to them under section 288, Criminal Procedure Code.

It should be borne in mind that the discretion once exercised is final and that it is not ordinarily open to higher Courts to interfere with it. The exercise of this discretion in a particular case is not governed by rules of evidence or procedure but is guided by experience, by observation of the demeanour of the witness and by other considerations not regulated by Acts of the Legislature. It is a matter of prudence and not of law. When the statement of a witness given in the committing Magistrate's Court appears to be, in all probability true and that given at the trial appears, to reason & experience, to be in all probability untrue, I do not think it is, imprudent on the part of the Sessions Judge to rely on the statement made in the committing Magistrate's Court. But the Sessions Judge, who wields

such high powers under the Criminal Procedure Code, should make a record of the fact that he admitted the former statement of the witness in preference to the latter and should give cogent reasons for doing so, in order to enable the superior Courts to scrutinise that the discretion was wisely exercised.

The mere fact, that the witness resiles from his former statement, is no ground to admit his statement in preference to the statement in the Sessions Court. There are several other considerations to be taken into account while exercising this discretion. In the present case, the record is silent whether the discretion, under section 288, Criminal Procedure Code, was exercised, much less why it was exercised. The Sessions Judge referred to the former statement which shows that it was admitted in evidence before him, but the deposition-sheet is still to be found in the Magistrate's record and was not transferred to the record of the Sessions Court. This is clearly wrong. The deposition should have been placed on the record of the Sessions Court after having removed it from the record of the committal Court and exhibited in the case like other documents and a note to that effect should have been made in the order-sheet. Ordinarily, the prosecution should have applied for the exercise of the discretion by the Sessions Judge, under section 288, Criminal Procedure Code, but that does not seem to have been done in the present case.

(13) I have read the deposition of Punaji (P. W. 3) given in the committal Court as well as that given at the trial, and I am satisfied that the former statement is true and that the latter is not. His presence at the scene of the occurrence cannot be doubted, but he wants to save his son-in-law by saying that he knows nothing about the occurrence. I am satisfied that the Sessions Judge was perfectly justified in relying on the former statement of Punaji.

(14) Every Sessions Judge is expected to be thoroughly conversant with the rules of procedure laid down in the Criminal Procedure Code as well as the rules of evidence as laid down in the Evidence Act as he has to try original criminal cases involving grave consequences. Any departure from the correct procedure, laid down by law, if it prejudices the accused, is fatal and vitiates the trial resulting in the failure of justice.

(15) The accused was arrested on 19-12-50 and he remained in Police custody when he was produced before the Magistrate on 23-12-50 for recording his confession. The Magistrate put a few questions to the accused and then proceeded to record his confession. The Magistrate's record does not show that he was satisfied that the accused wanted to make a confession voluntarily before his statement was actually recorded. After the statement was recorded, a memorandum as is required by section 364, read with section 164, Criminal Procedure Code, was added at the foot of the record.

(16) In my opinion, the Magistrate did not substantially conform to the spirit of law in recording the confession. His procedure is faulty in many ways. It is likely that other Magistrates in the State, who may be required to record confessions, hereafter may commit the same irregularities and so it is desirable to give detailed instructions to them in this

branch of delicate judicial duty in order that the irregularities may not occur.

(17) The first and the foremost duty of the Magistrate is to ask the accused as to the custody from which he is produced and the treatment he has been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the accused's mind. In case, the Magistrate discovers on such inquiry that there is a ground for such supposition, he should give the accused sufficient time for reflection before he is asked to make a statement and should assure himself that during this time of reflection he is completely out of police influence. If the accused is produced from Police custody, the Magistrate should refuse to record his confession forthwith and should send him to jail custody with instructions to the Jail authorities to keep him aloof from other undertrials and not to permit anyone interested in the prosecution to have any conference with him.

Before sending the accused to such custody he should be assured of every sort of protection against torture or pressure from outside agents or the Police and he should be asked the reason why he is going to make a confession which will surely go against him at his trial. He should further be told that even if he were to resile from his confession at the trial, it will still be used against him. After all this is done, he should be allowed time for reflection for a few days. During all this time, no Police officer, taking part in the investigation, should be permitted to be present. These safeguards become necessary to assure the Magistrate that the accused is a free agent to make a confession and that his willingness to confess is not the result of any deception practised on him.

(18) After the accused re-appears, the Magistrate should put him a few questions in order to ensure that during his stay in Jail none had access to him and that he was not influenced by anyone to make a confession. He should again be warned against a danger of making a confession. After all these warnings, and taking of precautions, if the accused still persists in making a confession, and if the Magistrate is satisfied about its voluntary nature, he should proceed to record the confession taking care to see that no Police officer is present at the time. A record of the steps taken by the Magistrate, to satisfy his conscience, about the voluntary nature of the confession, should be prepared in order that the trial Court and this Court may be assured that the Magistrate performed his duty in essence and not in form.

(19) The confession so recorded should be read over to the accused and his signature obtained thereon. After the confession is recorded, the Magistrate is in a better position to make out whether it was made voluntarily. If he is so satisfied, he should put a memorandum at the foot of the statement as required by section 364, read with section 164, Criminal Procedure Code. Such a confession is faultless and is admissible in evidence. After the recording of the confession, the accused should be sent to the Jail custody and never to the Police custody.

(20) In the present case, all these precautions have not been taken. The initial mistake the Magistrate has committed is that even though

he learnt that the accused was produced from Police custody, he did not give him time to reflect after giving him a warning against the effect of making a confession. His record does not show whether any Police officer, connected with the investigation, was present. He did not probe into the accused's mind in order to elicit from him the real reason of making a confession. Before recording the confession he did not make a note that he was satisfied that the accused wanted to make a confession voluntarily. Lastly, he sent the accused to Police custody after the confession was recorded.

(21) These irregularities are fatal to the admissibility of the confession at the trial. It is surprising that even though the Sessions Judge asked the accused whether he had made a confession voluntarily, he did not ask him whether it was true. In the committal proceedings, he resiled from his confession and in the trial Court he admitted the truth of a part of it only. All these are enough to conclude that the confession is neither voluntary nor true and that some of the facts were drilled into the accused by interested persons in order to procure a conviction. I decline to admit it in evidence for that reason.

(22) The second point for determination is whether the accused acted in the exercise of his right of private defence and whether his act fell under the general exception laid down under section 100, Penal Code, or whether his act was homicidal and fell under Secondly or Thirdly of section 300, Penal Code, and the special exception (2) applies as found by the Sessions Judge.

(23) The accused stated that there was a verbal quarrel between him and the deceased over the question of the stack of wood for preparing charcoal. The accused insisted on igniting the stack but the deceased objected to it. The deceased was annoyed and assaulted the accused with a stick. The witnesses, who were present, snatched the stick from him. Thereafter, the deceased took out a knife from his pocket and assaulted him with it. But he averted the blow with his axe. No evidence was led by the accused to prove his allegations regarding the snatching of the stick from the deceased and his assault on the accused with a knife. The eye-witnesses do not refer to this part of the story. Thus the story of the knife must be rejected and the trial Court was justified in doing so.

(24) Then the question arises whether the first part of the story that the deceased had given him stick blows and that the stick was snatched by the witnesses, is correct. Umrao stated that the deceased gave two blows to the accused but he does not refer to the snatching of the stick from him. He is corroborated by Dhansingh (P. W. 6). Punaji stated that the deceased gave stick blows to the accused. He too does not refer to the snatching of the stick from him, by the witnesses. Thus, there is no evidence to suggest that the stick was snatched from the accused by any one present. This part of the statement of the accused, therefore, appears to be untrue.

(25) The accused admits that he gave axe blows to the deceased as he assaulted him with a knife, but the conclusion of the trial Court was that it was given when he was being beaten with a stick. This finding, which is in

favour of the accused, to a certain extent cannot be disturbed in appeal. The trial Court further held that the accused had the apprehension that grievous hurt would be the result of the attack upon him with a stick by the deceased and that therefore he had a right of private defence presumably, under section 100, Penal Code. This is also a finding in favour of the accused and cannot be disturbed.

(26) The trial Court rightly stated the law of the private defence in para 12 of the judgment in the following terms:

"Necessary harm that could be apprehended does not mean that it should be carefully calculated or gauged or weighed in golden scales. One who was under an assault could not be expected to modulate his defence at every stroke."

(27) The trial Court held that as four blows were given by the accused, he had exceeded his right of private defence. There is no indication in the judgment to show that the accused would have been within his right if he had struck only one blow. The matter will be re-examined later.

(28) Section 96, Penal Code, lays down that nothing is an offence which is done in the exercise of the right of private defence. Section 97, Penal Code, gives a right to every person to defend his body and the body of another person against any offence affecting human body. Section 100, Penal Code, gives a right of private defence of body to the voluntary causing of death or any other harm to the assailant if the assault reasonably causes the apprehension of death or grievous hurt. But if the accused exceeds his right and kills his assailant though he could have caused lesser injury, the general exception may not apply. In that event, the case is likely to fall under exception 2 to section 300, Penal Code.

(29) The question, therefore, arises whether the act of killing will fall under the general exception as laid down under section 100, Penal Code, or whether it will fall under the special exception 2 to section 300, Penal Code. The question is delicate one, and it is desirable to look to the law of private defence somewhat minutely before applying it to the facts of this case.

(30) Before embarking on this task, it is desirable to examine sections 299, 300 and 304, Penal Code, closely as it will be necessary to determine the nature of the offence, exceptions apart, if the accused is held guilty. The discussion will also be a good guide to the Sessions Judges and help them to understand the law of culpable homicide and murder.

(31) Killing may be murder although it is not premeditated. Generally speaking the proposition "Murder" is killing with the intention of killing or inflicting a fatal injury will cover clauses (1), (2) & (3) of section 300, Penal Code. Cases under clause (4) of section 300, I. P. C. are very rare and a perusal of illustration (d) to section 300, I. P. C. will amply bear me out. What the Sessions Judge should do, therefore is to look to section 300, Penal Code. If the act falls under any one of the four clauses, it is murder, provided of course, that no exception applies. Clause (3) to section 300, I. P. C. refers to a bodily injury sufficient to cause death and section 299, I. P. C. refers to the bodily injury likely to cause death. The distinction between the two is one of degree.

"Likely to cause death" connotes that there is less probability of death but "Sufficient to cause death" means that the probability of death is greater.

If, on referring to section 300, I. P. C., the Judge is of opinion that the killing does not come within any one of the four clauses, he should then refer to section 299, I. P. C., and if the act of killing comes within the second part of section 299, I. P. C., it falls under section 304, part I of the I. P. C. But if there is absence of intention, and knowledge only is established, it comes under Part II of that section. Cases under exceptions to section 300, I. P. C., will fall under part I to section 304, Penal Code. In murder cases, the burden of proving that the accused had the requisite intent is on the prosecution. In majority of cases this intention is proved by the act itself in relation to the surrounding circumstances. If an offence falls under part II of section 299, I. P. C. it will be murder, if clause 2 or 3 of section 300, I. P. C. applies, and the first part of section 304, I. P. C. is applicable only when the offence would have been murder if one of the exceptions does not apply.

(32) The Sessions Judge has ruled out that the act was done with the intention of killing. Part I of section 299 and Firstly to section 300, I. P. C. do not apply for that reason. His finding is that the case falls under part II of section 299, I. P. C., and also under thirdly to section 300, Indian Penal Code. There is intention to cause bodily injury and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death.

(33) A man's intention can only be gathered from his acts as every man is presumed to intend the natural consequences of his act. In deciding the question of intention, therefore, the nature of the weapon used, the part of the body on which the blow is given, the force of the blow and its number are some of the factors which assume importance. Death from a blow or blows on the head with a heavy sharp edged weapon is probably as a rule associated by the villagers with the breaking of the skull but the ignorance of the actual cause which will bring about the victim's death as a result of the blow or blows cannot affect the question of striker's intention. In the present case, a heavy sharp-edged weapon like an axe was used and four blows were given as would appear from the medical evidence.

There are multiple fractures of the skull which proves the force of the blow. The evidence of the eye-witnesses is that the victim fell down on getting the first blow and yet the accused struck him three more blows with the same weapon. The medical evidence is that every injury caused to the victim was sufficient to cause death. The fact, that the accused went on striking, shows unmistakably that he intended to cause bodily injury and that the bodily injury intended to be caused was sufficient to end fatally. The offence thus clearly falls under Thirdly to section 300, Penal Code, and it is murder unless the general or the special exception applies.

(34) The question, therefore, arises under what circumstances the accused will be said to have exceeded the statutory right of private defence. The exercise of the right of private defence is derived from English law. Self-help was the first rule of criminal law. "The right of private defence", wrote Bellham,

" 'is absolutely necessary.' The vigilance of the Magistrate can never make up for the vigilance of each individual on his own behalf."

(35) The rule has been laid down in Russel on Crimes, 9th Edition, in the following terms:

"A man is justified in repelling force by force in defence of his person, habitation or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. (Page 512)."

"When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaulted him, and excuse himself on the ground of self-defence. But, in order to entitle himself on this plea, he must first show that before a mortal stroke was given he had declined further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death." (Page 505).

"In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated or with malice, and from the doctrine which has been above laid down it appears that the law requires that the person who kills another in his defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, so far he turned on his assailant; and that not factitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood." (Page 506).

(36) The matter is encrusted with a series of judicial decisions and I may instance a few in order to show that the law in India is almost the same as in England. 'ALINGAL KUNHINAYAN v. EMPEROR', 28 Mad 454 is often cited as an authority in India on the subject of the law of private defence. I cannot do better than to quote from that decision.

"But a man who is assaulted is not bound to modulate his defence step by step according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict, between them, he happens to kill, such killing is justifiable, and, of course where the assault has once assumed a dangerous form every allowance should be made for one, who with the instinct of self preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

(37) In 'CHHATAR v. EMPEROR', AIR 1929 All 897, it was pointed out by Young J. that where a man has been attacked by another man who uses a weapon such as a lathi, it is impossible to lay down with any sort of accuracy the extent to which the attacked person rightfully acts in his defence. In such a case if the accused hits the victim rather harder than perhaps he intended to have done and thus

kills him, he cannot be said to have exceeded his right of private defence and should not be convicted.

(38) The following remarks of Aga Haidar J. in 'AHMED DIN v. EMPEROR', AIR 1927 Lah 194 also throw light on the subject of private defence:

"That in the excitement & confusion of the moment it is not to be expected that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though the counter attack should not be out of all proportion to the force employed in the original attack."

The same view was adopted in a later Lahore case. I may instance 'DINANATH v. EMPEROR', AIR 1948 Lah 117.

(39) In 'RAMADHIN v. EMPEROR', AIR 1933 Oudh 59, it was held that if a strong and powerful adversary attacks an accused with a lathi and if he causes the death of his adversary, he cannot be said to have exceeded his right of private defence.

(40) In 'MOHAMMAD HABIB v. EMPEROR', AIR 1940 Pat 595, the facts were similar to this case. In that case the deceased hit the accused with a stick and the accused hit back and caused injuries to the assailant which resulted in his death. It was held that he had not exceeded his right of private defence.

(41) In 'INZAR GULKHAN v. EMPEROR', ILR (1936) Nag 194, the same principle of law was enunciated and applied. In addition the remarks of Markby J., in 'QUEEN v. MOIZUD-DIN', 11 W R (Cr) 41 at p. 42 which are as follows, were approved:

"If the prisoner was justified in using it (lathi) at all surely he is not to be expected on such occasion to measure out with any graver nicety the force of his blow."

(42) All these authorities lay down the rule that even if the accused were to cause more harm than is absolutely necessary in repelling the attack, it cannot be said that he exceeded the right given to him by law.

(43) The accused was a labourer under the contractor and the deceased was his Hawaldar. He used to watch the work of the labourers and had authority to do so from his master. He thus occupied an important position and it is why, as the accused says, he abused him and when he went to the length of striking him with a stick, looking to the fact that the deceased had an authority and that in exercise of that authority he assaulted the accused it was but natural that he should apprehend danger to his life. When he found that the victim was beating him mercilessly and it was not possible for him to prevent the assault by any other means, he struck him with his axe on the head and to this extent, the learned Judge agrees that the accused was within his right. The medical evidence shows that the first injury was on the left frontal parietal area and that on opening the wound it was found that there was fracture of frontal and left parietal bone. A portion of the brain matter was also found protruding out of this wound.

This injury was sufficient to cause death. The accused was justified in causing this injury on account of a sudden attack on him by a man in authority. The apprehension that the victim would get up and again assault him was all the more prominent because of

the counter attack by him in retaliation of the attack by the deceased. Even after the first blow he apprehended danger and this time may be even to his life and therefore he went on striking him in confusion. In fact, according to the medical opinion, the other blows, even if they were sufficiently serious, did not in any way affect the effect of the first blow on receiving which the deceased would have died instantaneously. The three blows, therefore, have not much to do with the result that followed. They only show that the apprehension continued.

(44) Even if the blow was given somewhat harder, it does not follow that the accused had exceeded his right of private defence when it is once held that he had the right of private defence and in a proper case to either disable the assailant or kill him.

(45) Applying the law enunciated above, I come to the conclusion that the learned Judge of the trial Court was not justified in holding that the case falls under the 2nd exception to section 300, Indian Penal Code. Disagreeing with him I hold that it falls under section 100, Indian Penal Code which gave him the right to take the life of his assailant under certain circumstances which, in my opinion, exist in the present case. It is unfortunate that the life of a man should be extinguished on petty affairs but the victim himself is responsible for the consequences as he took the law in his own hands and assaulted a villager without any justifying cause. The case, therefore, comes under the exception and no offence is committed.

(46) In the result the appeal is accepted, the conviction and sentence of the accused are set aside and he is acquitted and set at liberty.
B/ D.H. Appeal allowed.

A. I. R. 1952 BHOPAL 31

SATHAYE J. C.

Bindrabandas, Applicant v. Sitaram, Non-Applicant.

Criminal Revn. No. 12 of 1952, D/- 22-4-1952.

Criminal P. C. (1898), Ss. 367, 424 and 439 — Contents of appellate judgment — Summary rejection of appeal on ground of clerical error in memo of appeal is illegal.

The provisions of S. 367, Criminal P. C., are applicable not only to a judgment of a trial Court but also to that of an appellate Court and it shall contain the point or points for determination, the decision thereon and the reasons for the decision. A judgment, which does not contain these elements, is no judgment:— 8 Nag LR 84, 14 Cri L J 419 (Cal) and AIR 1945 Nag 116, Ref. (Para 3)

Where the accused in his memo of appeal through clerical error wrongly states Section 335, I. P. C. instead of S. 334, I. P. C. under which he was convicted, the order summarily rejecting the appeal on this ground is highly improper and also illegal and would be set aside in revision.

(Para 4)

Anno: Cr. P. C., S. 367 N. 4, S. 424 N. 7, S. 439 N. 18 Pt. 4.

L. N. Jaimini, for Applicant; Government Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras
(13) 40 Cal 376: (20 Ind Cas 403: 14 Cri L J 419) 3
(12) 8 Nag L R 84: (15 Ind Cas 975: 13 Cri L J 559) 3
(45) AIR 1945 Nag 116: (46 Cri L J 595) 3

ORDER: The applicant Bindrabandas was, on a complaint by the non-applicant Sitaram convicted by the Magistrate Second Class, Raisen, of an offence of causing simple hurt on grave and sudden provocation under section 334, Indian Penal Code and sentenced to pay a fine of Rs. 50/-. His appeal to the District Magistrate, Raisen was rejected on the ground that the appeal was against a conviction under section 335, Indian Penal Code which was not true. On revision, the Sessions Judge recommends that the order of the lower appellate Court be set aside as it is illegal and improper.

(2) The reference has to be accepted. It appears that in the memo of appeal the applicant committed a clerical error in stating that he was convicted under Section 335, I. P. C., and it looks as if the District Magistrate, without examining the record, was looking out for some excuse to dispose of the appeal summarily. It is thus obvious that his order, rejecting the appeal on the ground of a mere clerical error, is highly improper. It further appears that the order is not only improper but also illegal as the District Magistrate has not complied with the provisions of section 367, Criminal Procedure Code and has not applied his mind to the correctness and legality of the conviction, simply on the ground stated above.

(3) The provisions of S. 367, Criminal Procedure Code are applicable not only to a judgment of a trial Court but also to that of an appellate Court and it shall contain the point or points for determination, the decision thereon, and the reasons for the decision. A judgment, which does not contain these elements, is no judgment. In 'JAIRAM v. EMPEROR', 8 Nag L R 84, it has been held that:

"No judgment of a Court, other than a High Court, which purports to dispose of an appeal under section 423, is a legal judgment unless it contains at least the point or points for determination, the decision thereon, and the reasons for the decision."

This has been so held in the decision in 'FI-DOI HOSSEIN v. EMPEROR', 40 Cal 376. In 'MOHAMMAD HUSSAIN v. EMPEROR', AIR 1945 Nag 116 there was no statement of the points for determination and detailed scrutiny of the prosecution evidence. It was held that the order, dismissing the appeal, was illegal and the appeal was ordered to be re-heard and disposed of according to law.

(4) It would thus appear that the order of the District Magistrate has been rightly stated to be improper and illegal and as such as he has not considered the appeal on merits, it is proper that the appeal should be re-heard and disposed of according to law. The reference is, therefore, accepted. The order of the District Magistrate, rejecting the appeal, is set aside and it is ordered that the record be sent back to the District Magistrate, Raisen, who shall hear the appeal on merits and dispose it of according to law.

C/ K.S.

Case remanded.

A. I. R. 1952 BHOPAL 32**SATHAYE J. C.**

Iqbal Ahmed and another, Defendants-Applicants v. Mohammad Hanif, Plaintiff-Non-applicant.

Civil Revn. No. 80 of 1951, D/- 10-4-1952.

(a) Civil P. C. (1908), S. 115, O. 6, R. 8, O. 8, R. 2 and O. 14, R. 1 — Duty of defendant to raise all grounds of defences in his pleading — Defence of illegality of contract not raised in trial Court — Power of High Court to entertain such plea in revision.

Ordinarily, the defendant must raise, in his pleading, all matters which show the suit to be non-maintainable or that the transaction could not be enforced on account of reasons to be stated and all such grounds of defence, as, if not raised, are likely to take the opposite party by surprise or would raise issues of fact not arising out of the plaint or the written statement. The Courts are, however, bound to take notice of any ground of any illegality appearing on facts not only stated in the party's pleading but also disclosed otherwise and the authority in support of this latter view is that a Court can frame an issue if it found that it arose out of the pleadings or is involved therein.

(Para 3)

Where the defendant against whom a decree for recovery of a loan has been passed, raises a new plea for the first time in revision that the contract was unenforceable as being opposed to public policy and the facts pleaded in the parties' pleadings or otherwise disclosed support such a plea, the Court is bound to take notice of it and decide it: AIR 1944 Mad 387, Ref. (Para 4)

Anno: C. P. C., S. 115 N. 2; O. 6 R. 8 N. 1; O. 8 R. 2 N. 1, 6; O. 14 R. 1 N. 2.

(b) Contract Act (1872), S. 23 — Immoral or opposed to public policy — Advance of loan by A to B for purpose of avoiding prosecution of B's father for embezzlement — Contract is valid and enforceable.

Where A advanced a loan to B with full knowledge that the money was required for payment to C on whose complaint B's father was in police custody for the offence of criminal misappropriation:

Held that the object or consideration for the contract of loan cannot be said to be immoral or as opposed to public policy. The contract was valid and could be enforced by the plaintiff: AIR 1950 Nag 71 and AIR 1936 Mad 603, Disting. (Paras 7, 8)
Anno: Contract Act, S. 23 N. 15, 31.

R. Punjwani, for Applicants; Md. Yakub, for Non-applicant.

REFERENCES: Courtwar/Chronological/ Paras
(30) AIR 1930 All 357: (52 All 406) 7
(36) AIR 1936 Mad 603: (165 Ind Cas 765) 7
(44) AIR 1944 Mad 387: (1944-1 Mad LJ 256) 4
(40) 191 Ind Cas 241: AIR 1940 Nag 305 7
(50) AIR 1950 Nag 71: (ILR (1950) Nag 105) 6
(1940) 2 KB 590 4

ORDER: This is defendants' revision petition challenging the judgment and decree in civil suit No. 202 of 1951 in the Court of the Small Causes, Bhopal.

(2) The plaintiff-non-applicant, sued the defendants for recovery of a loan of Rs. 300/- which was said to have been advanced by him to the petitioners for being deposited with the Secretary of Wakf property so that it would be possible for the latter to withdraw a criminal case against the defendant no. 1 for embezzlement of certain money of the said property. The defendants-petitioners had denied the claim wholesale and the learned Judge of the lower Court finding that the loan was proved, passed a decree. It may be noted that there was no contention that the consideration or object of the contract of the loan was immoral or against public policy and as such the contract was void.

(3) The very first ground in the revision petition is that the decree and order of the lower Court was against public policy. It is obvious, though the contention has not been correctly stated, that the petitioners contend that the consideration or object of the contract of the loan was against public policy and therefore the contract could not be enforced.

The point for determination, therefore, is whether the contract of the loan is unenforceable as now contended. Ordinarily the defendant must raise, in his pleading, all matters which show the suit to be non-maintainable or that the transaction could not be enforced on account of reasons to be stated and all such grounds of defence as, if not raised, are likely to take the opposite party by surprise or would raise issues of fact not arising out of the plaint or the written statement. The Courts are however bound to take notice of any ground of any illegality appearing on facts not only stated in the party's pleading but also disclosed otherwise and the authority in support of this latter view is that a Court can frame an issue if it found that it arose out of the pleadings or is involved therein.

(4) In 'ABDULA SAHEB v. GURUVAPPA & CO.', AIR 1944 Mad 387 there is a quotation of the words of Lord Mansfield in an English case ('HARRY PARKER LTD. v. MASON', (1940) 2 K B 590). The quotation bears reproduction, and is as below:

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it."

It would thus appear that where there is a pleading or otherwise, as soon as the Court finds that the contract which is sought to be enforced, militates against public policy, it is

bound to refuse to enforce it no matter when and where the contention is made. It is in this view that though the contention was not made on the facts pleaded by the deft., that it was allowed to be made in this Court.

[5] Examining the record, therefore, minutely and particularly the plaint, it is found that the plff.'s case was that the deft. 1 had misappropriated a sum of Rs. 700 and odd and was in Police custody since 12-5-49. The deft. 2 who is a son of deft. 1 approached the plff. and asked him for a loan of Rs. 300 on behalf of defts. 1 and 2 so that it would be deposited and the deft. No. 1 would be released and then both of them would repay the loan. The plff. then deposited Rs. 300 with the secretary of the wakf property who was collecting the amount of the wakf. The deft. 1 was in the end released. Now the question is whether there is anything in the evidence on record which indicates that the consideration or object of the contract was immoral or against public policy. In so far as the plaint is concerned, in my opinion, there is nothing in it to support the contention. Sadduruddin (p. w. 2), the Secretary of the Wakf Committee, stated that the amount embezzled was deposited on behalf of the deft. and he was released in the result. There is evidence of Kudratullah (p. w. 3) that the plff. advanced the money to be deposited on behalf of the deft. 1 so that he could be released.

[6] The question, however, is whether the consideration or object of the loan as between the plff. and the defts. was to stifle the prosecution against the deft. 1. In *Mohanlal Jagannath v. Kashiram Gokul*, A. I. R. 1950 Nag. 71 it has been held that:

"Any agreement arrived at between the parties for compounding a non-compoundable offence or for withdrawal or abandonment of the prosecution for such an offence is a contract opposed to public policy and void under S. 23, Contract Act."

In that case, the party had agreed to transfer his 1/2-proprietary share to the opposite party who in his turn had agreed to see that the prosecution against the former for an offence under s. 457, Penal Code, was withdrawn. In the case on hand, however, it did not lie either with the plff. or with the deft. to withdraw the prosecution. In fact, there was no agreement between the plff. and the defts. in the matter of the prosecution nor was the stifling of the prosecution the consideration or the object of the contract. It is not said anywhere on the record that there was an agreement between the Wakf Secretary and the deft. 1 that the prosecution would be withdrawn on deposit of the embezzled amount nor is there any evidence to show that the plff. knew of any such agreement. Sadduruddin (p. w. 2) does not say a word about it.

[7] The learned counsel for the applicants referred to the decision in *S. Vairawa Nadar v. Pothikachala Nadar*, A. I. R. 1936 Mad. 603 wherein it is observed:

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"Where a person lends money to a partnership which is an illegal one or forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, a suit by him to recover the amount so lent is not maintainable."

Here again, however, the case is liable to be distinguished because in that case the plff. knew that the money was going to be used for a purpose forbidden by law. That was not so in the case on hand. Whether the full or part of the embezzled amount was deposited or not, the discretion of withdrawing the prosecution against the deft. 1 was entirely with the Wakf Committee of which Sadduruddin was the Secretary. None of the parties was or could be certain that the prosecution would be withdrawn and therefore even if the plff. knew of the motive of the deft. 1 to support his request for withdrawal of the prosecution with an accompanying deposit still that, in my opinion, could not militate against the contract or its consideration or the object as being opposed to public policy. In this connection reference may be made to the decision in *Dehra Dun Mussoorie Electric Tramway Co., Ltd. v. Official Liquidators*, A. I. R. 1930 ALL. 357 wherein it is observed that:

"Motive is essentially different from the consideration or object of the contract and the fact that the contract was entered into in the expectation of some ulterior gain would not affect the contract which is valid in every way."

In *Kashinath v. Bapurao*, 191 Ind. Cas. 241: A. I. R. 1940 Nag. 305, it is observed that:

"Section 23, Contract Act, is not concerned with motive. It confines the Court to the object of the transaction and not to the reasons or motives which prompted it. The law does not prevent even the most degraded of men from having their own friends and from receiving gifts from them whatever the motive of the donors may be, provided the object is not to induce or encourage the commission of an illegal act."

[8] As pointed out above, therefore, there is nothing in the evidence, much less in the pleadings to suggest that the object or the consideration of the contract of the loan, by the plff., to the defts., was immoral or was hit by the consideration of the public policy. It being so the contract was liable to be enforced, and the decree of the lower Court is correct.

[9] The revision petition is, therefore, dismissed with costs and the petitioners are ordered to pay the costs of the non-petitioners. Counsel's fees would be Rs. 15 for each side if certified.

B/K.S.

Revision dismissed.

A. I. R. 1952 Bhopal 33

SATHAYE J. C.

Motichand—Plaintiff-Applicant v. Ant Ram—Defendant-Non-Applicant.

Civil Revn. No. 79 of 1952, D/- 12-4-1952.

Civil P. C. (1908), O. 9, R. 9—"Sufficient cause"—Meaning of—(Limitation Act (1908), S. 5).

What is sufficient cause within the meaning of O. 9, R. 9 depends upon the circumstances of each case and no hard and fast rule can be laid down in that matter. A generous construction has to be placed on the enactment to restore a suit dismissed in default and a party should not

be deprived of a hearing unless there is an indication of misconduct or gross negligence on his part, the main question to be examined being only whether he intended to be present at the hearing of the suit and did his best to do so.

[Para 5]

Where the plaintiff who was throughout appearing in the suit through his pleader could not be informed of the date of hearing owing to sudden illness of his pleader and the suit was dismissed for default :

Held, that there was 'sufficient cause' for non-appearance.

[Para 6]

Anno. C. P. C., O. 9, R. 9, N. 8; Lim. Act, S. 5, N. 6.

Mohammad Yakub — for Applicant; R. C. Rai — for Non-Applicant.

REFERENCE:

(40) A. I. R. 1940 Rang. 162 : (189 Ind. Cas. 338 F. B.).

Para
3, 7

Order.—This is a revision petition against the order dated 18-10-1951 of the District Judge dismissing the applicant's Misc. Appeal No. 25 of 1951 against the order dated 14-7-1951 of the Subordinate Judge, Bareilly, rejecting his application for restoration of suit No. 134 of 1951, dismissed for default on 17-3-1951.

[2] The applicant-plaintiff's suit was pending in the Court of the Subordinate Judge, Bareilly for framing issues, on 3-3-1951 but was adjourned to 17-3-1951 as the Judge was on leave. He generally appeared in the suit through a pleader but, on the latter date, neither the pleader nor the plaintiff was present and the suit was dismissed with costs in default of the plaintiff. It is not clear from the order-sheet if the defendant or his pleader was present on that date.

[3] The plaintiff's pleader, on 27-3-1951 filed an application for restoration of the suit to file in which it was stated that the plaintiff had no intimation of the date of the hearing and the pleader had become very ill and had gone to Bhopal from where he could not return owing to his illness and therefore the suit be restored. The defendant, who was noticed, stated that the illness of the Vakil was not a sufficient ground for plaintiff's non-appearance as he could have instructed another counsel to put in appearance on his behalf. It was also said that absence of intimation of the date of hearing to the plaintiff was also not a sufficient ground for his non-appearance. It was said that the plaintiff was grossly negligent in the conduct of the suit. The learned Sub-Judge found as a fact that the plaintiff's pleader was taken suddenly ill and had left and could not appear because of his illness. It was also held that the plaintiff could not be given intimation of the date of the hearing on that account, but the learned Sub-Judge found himself bound by the decision in *U Aung Gyi v. Government of Burma*, A. I. R. 1940 Rang. 162, in which the pleader's delay in appearing in the suit even by five minutes was held to be not a sufficient ground. The learned District Judge found fault with the affidavit which was filed by the pleader late during the proceedings of restoration and in a vague order indicated that he was not satisfied with the facts themselves and dismissed

the appeal. The plaintiff now comes up in revision.

[4] In my opinion, the learned District Judge has not properly applied his mind to the facts of the case and has avoided examining the law on the point. In such matters, the contentions of the parties have to be closely examined. The facts alleged in the application were not denied by the defendant-non-applicant in his written statement, he having confined himself only to the sufficiency or otherwise of the ground for non-appearance admitting that the facts stated were correct and true. The learned District Judge had, therefore, not a difficult task in accepting the facts, as stated by the plaintiff, as correct.

[5] The only point for determination, therefore, is whether there was a sufficient ground for the non-appearance of the plaintiff on the date of hearing of 17-3-51. In spite of instructions to the contrary the Subordinate Judge has left the matter of writing the order-sheets to his clerk. This is highly improper, as has been pointed out to him time over again. It may be pointed out that the term "Sufficient cause" has not been defined anywhere and sufficiency of the cause or the ground depends upon the circumstances of each case and no hard and fast rule can be laid down in that matter. A generous construction has to be placed on the enactment to restore a suit dismissed in default and a party should not be deprived of a hearing unless there is an indication of misconduct or gross negligence on his part, the main question to be examined being only whether he intended to be present at the hearing of the suit and did his best to do so.

[6] Examining the record in that light, there is no denying of the fact that the plaintiff was throughout appearing through his pleader, Shri Narbada Charan Lal. There is no denying of the fact that Shri Lal was taken suddenly ill after the hearing of 3rd March 1951 and left for treatment and could not return by the date of hearing on 17th March 1951. There is an affidavit by him that on that account he could not give any intimation to the plaintiff of the date of hearing. In the circumstances, the allegation, that the plaintiff had no intimation of the date of the hearing, could not be refuted in the absence of any evidence to the contrary. That being so, in my opinion, there was sufficient ground for the non-appearance of the plaintiff on 17-3-51 when the case came to be called. He had done his best by engaging a pleader who in his turn was appearing at every hearing and had it not been for the sudden illness of the pleader it may be presumed that the suit would not have come to grief in the manner it did on 17-3-51. No blemish, therefore, could be attached to the pleader, much less to the plaintiff and as such in my opinion, there was clearly a sufficient cause as required for restoration of the suit.

[7] In the case reported in A.I.R. 1940 Rang. 162, the pleader for the plaintiff was present at the very place in the next adjoining room and it was not said that he had not been able to hear the call. The pleader also knew that he was likely to be engaged in another Court and therefore, it was held that it was his duty to get himself represented in the Court concerned. The facts, as I said, are entirely different and are distinguishable from the facts in the case on hand and applying the principle, as already pointed out, that sufficiency of ground depends upon the merits of each case, it is not difficult to observe that the decision in *U Aung Gyi v. Govt. of Burma*, A.I.R. 1940 Rang. 162 could not be applied.

[8] In the circumstances, it is obvious that both the Courts below failed to exercise their discretion in a judicial manner and also decided the case with material irregularity and arrived at an incorrect decision. The revision petition is, therefore, allowed with costs against the non-applicant who shall bear his own costs. The orders of both the Courts below, rejecting the application for restoration of the suit, are set aside and the suit is restored to file and is sent back to the trial Court for proceeding with it according to law from the stage reached on 17-3-1951. Counsel's costs in this Court will be Rs. 15 only for each party. The parties are ordered to appear in the trial Court on 12th May 1952.

B/K.S.

Revision allowed.

A. I. R. 1952 Bhopal 35

SATHAYE J. C.

Jeewanlal and another — Petitioners v. Government of Bhopal and others—Non-petitioners.

Misc. Civil Case No. 14 of 1952, D/- 12-7-1952.

(a) Constitution of India, Art. 226—Application for writ of prohibition — Application for interim relief for temporary injunction — Application is maintainable only if main petition is tenable—(Civil P. C. (1908), O. 39, R. 1). [Para 6]

Anno. C. P. C. O. 39, R. 1 N. 3.

(b) Constitution of India, Art. 226—"Any other purpose"—Infringement of legal right is not included.

A petition, which makes a grievance not against the infringement of any right under Chap. III of the Constitution but against infringement of a mere legal right said to have been obtained or acquired under a local statute, is not tenable under Art. 226 and no writs available under that Article can be issued: A. I. R. 1952 S. C. 12, *Rel. on.*; A. I. R. 1952 Bhopal 16, *Foll.*, A. I. R. 1951 Nag. 47 (1); A. I. R. 1951 Nag. 94; A. I. R. 1951 Nag. 181; A. I. R. 1951 V. P. 3; A. I. R. 1951 Orissa 81; A. I. R. 1952 T.-C. 1; A. I. R. 1952 Cal. 315; A. I. R. 1952 Punj. 58; A. I. R. 1952 Punj. 176; A. I. R. 1952 H. P. 35, *Dissented from.*

[Para 13]

R. Punjwani — for Petitioners; Government Advocate — for Non-Petitioners.

REFERENCES: Courtwar/Chronological/

(52) A. I. R. 1952 S. C. 12 : (I. L. R. (1951) Cut. 637)	12
(52) A. I. R. 1952 Bhopal 16	9
(52) A. I. R. 1952 Cal. 315 : (87 Cal. L. J. 149)	10
(52) A. I. R. 1952 H. P. 35	10
(51) A. I. R. 1951 Nag. 47 (1) : (52 Cri. L. J. 813)	10

(51) A.I.R. 1951 Nag. 94 : (I. L. R. (1951) Nag. 563 F.B.) 10

(51) A. I. R. 1951 Nag. 181: (I. L. R. (1951) Nag. 438):10

(51) A. I. R. 1951 Orissa 81 : (16 Cut. L. T. 202) 10

(52) A. I. R. 1952 Punj. 58 : (53 Pun. L. R. 268) 10

(52) A. I. R. 1952 Punj. 176 : (53 Pun. L. R. 443) 10

(52) A. I. R. 1952 T.-C. 1 : (1951 Ker. L. T. 714) 10

(51) A. I. R. 1951 V. P. 3 10

Order.—The petitioners filed an application under Art. 226 of the Constitution for (a) issue of a writ of certiorari, to the Government of Bhopal to quash its order dated 18-4-1952, reinstating non-petitioner 3 and/or the order dated 26-6-1952 and a notification of the same date passed by it, superseding the Municipal Board, Sehore, (b) a writ of prohibition to prevent the Government of Bhopal non-petitioner 1 from taking steps to implement the said notification and the non-petitioners 1 to 3 from giving effect to it as also the order, (c) a writ of prohibition or mandamus directing non-petitioners not to prevent the petitioners from exercising their legal rights as Chairman and Member of the Board by holding meetings etc. including the legal right of selecting a candidate for the post of the Executive Officer from out of the applicants for it and (d) other ancillary orders.

[2] In the same petition a prayer for an interim temporary injunction to restrain the non-petitioners 2 and 3 from taking charge from the petitioner 1 and an interim order as stated in cls. (b) and (c) above, was made. A separate application for issue of such temporary injunction, as stated above, is also filed, and this order disposes of the interim petition.

[3] The main petition running into about 50 paragraphs states a long history of the occurrences prior to the impugned notification and order. The gravamen of the whole petition lies in the condemnation of the order and notification dated 26-6-1952 said to have been passed, under s. 11 of the Act VI of 1916 (Described as Bhopal State Municipalities Act), on the ground that it is mala fide, illegal, ultra vires and against principles of natural justice, by which the fundamental and legal rights under the Municipal Act and the Constitution are infringed by the opposite parties (see para. 35) as no equal opportunity, under Art. 14 of the Constitution, was given to the applicants for the post in response to the advertisement of the Municipal Board and the Petitioners were deprived of their right to act in accordance with the said provision of the Constitution.

[4] The non-petitioner 1 filed an affidavit that the notification has already been acted upon and the charge of the Municipal Board has been taken by the Collector-non-petitioner 2 and the non-petitioner 3 as ordered.

[5] The non-petitioners opposed the interim application on the ground that the main petition itself is not tenable in law and that the notification and the order sought to be impugned are perfectly legal and proper.

[6] The interim petition has to be decided on the consideration of the tenability or otherwise of the main petition as, if the very basis of the interim petition is lost, then the ancillary petition falls to the ground. The basis of the right to file this petition is said to be that the fundamental right of the 47 applicants or candidates for the post of the Executive Officer, for an equal opportunity under Art. 14 of the Constitution, is infringed. Obviously, therefore, it is not infringement of the fundamental rights of the petitioners under chap. III of the Constitution, but it is the infringement of such right of some others, not on record, on which the petition is founded.

[7] A perusal of the long petition clearly indicates that the petitioners have hardly any concern with the fundamental right of the applicants for the post or any anxiety to preserve such right. At no place is found any averment or statement to indicate how the petitioners are affected by even the supposed infringement of rights of the said applicants. Even the names of these applicants are not stated in the petition and it is clear that it is the alleged infringement of their own legal rights, such rights alone under the Municipal Act that constitutes the basis on which the petition is filed.

[8] The question, therefore, is whether such petition is tenable in law, under, Art. 226 of the Constitution. It is said that an application for writs, under Art. 226, is tenable not only for the enforcement of any rights under chap. III of the Constitution but also for any other purpose i. e. for the enforcement of even any legal right.

[9] This very question, relating to the interpretation of this very clause or expression was before me in an earlier case as reported in *Abdul Qadir v. Custodian of Evacuee Property, Bhopal State*, A. I. R. 1952 Bho. 16 and I have held that the expression means a purpose ancillary to the enforcement of the rights under chap. III of the Constitution and none else and further that no such petition for the enforcement of merely a legal right is tenable. I may also add that my learned brother Shri Tribeni Saran (Ex-Addl. Judicial Commissioner) has taken the same view which has been referred to in my decision *ibid*.

[10] As against this a large number of decisions of the different High Courts have been cited before me viz. *Kanhaiyalal Mulchand v. State of Madhya Pradesh*, A. I. R. 1951 Nag. 47 (1), *Laxmibai v. State of Madhya Pradesh*, A. I. R. 1951 Nag. 94 (FB), *Gopal Jairam v. State of Madhya Pradesh*, A. I. R. 1951 Nag. 181, *Rama Govind Singh v. Chief Commissioner Vindhya Pradesh*, A. I. R. 1951 vindh pra. 3, *Raghunath Patnaik v. State Transport Authority, Orissa*, A. I. R. 1951 Orissa 81, *In re Dr. John Matthai*, A. I. R. 1952 Trav.-C. 1, *Carlsbad Mineral Water Mfg. Co. Ltd. v. H. M. Jagtiani*, A. I. R. 1952 Cal. 315, *Mangal Sain v. State of Punjab*, A. I. R. 1952 Punj. 58, *Raj Krishan v. Chief Commissioner,*

Delhi, A. I. R. 1952 Punj. 176 and *Wazir Chand v. State of Himachal Pradesh* A. I. R. 1952 Him. Pr. 35.

[11] With all my respect for the learned Judges and in all humility I am constrained to say that a close perusal of the cases clearly shows that the learned Judges, who made observations supporting the view sought to be urged here that the expression "any other purpose" means and includes "enforcement of a legal right," do not seem to have indicated the reasons in support of their view expressed or for the above interpretation of the expression "any other purpose." In my order, in the above case *ibid*, in paras. 10 and 11 at p. 18, I have tried, to the best of my ability and after due consideration, to adhere to the rules of interpretation and I must confess that I could not get away from the force of the reasoning as found in the said paragraphs. During arguments in this Court I expressed that I was prepared to be dislodged from the position taken if I was satisfied that the opposite view was justified by some reasoning with reference to the rules of interpretation as has been stated in the above paragraphs. In no case cited before me was such an attempt made and in the circumstances, I am constrained to observe that I cannot persuade myself to depart from the view I have already taken.

[12] The Supreme Court, in its decision in *State of Orissa v. Madan Gopal Rungta*, A. I. R. 1952 S. C. 12 has, in para. 5, observed as follows :

"The language of the Art. (226) shows that the issuing of writs or directions the Court is founded only on its decision that a right of the aggrieved party under part III of the Constitution (Fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Art. 226 have to be read in the context of what precedes the same. Therefore the existence of right is the foundation of the exercise of jurisdiction of the Court under this Article."

[13] An attempt was made by the learned counsel for the petitioners to refer to the facts of the case and it was urged that the learned Judges were dealing in that case with the grant of a temporary injunction for the purpose of enabling the aggrieved parties to circumvent the provisions of s. 80, Civil P. C., while that was not so in the case on hand. The facts in each case are bound to be different but it is the principle or the rule laid down that has to be examined. The Supreme Court has obviously, in the above case, laid down a rule indicating the interpretation of the expression "any other purpose" in Art. 226 of the Constitution and in my opinion, I find from it full support to the view which I have taken in the case noted above. That being so, in my opinion, the petition, which makes a grievance not against the infringement of any right under chapter III of the Constitution, but against infringement of a mere legal right said to have been obtained or acquired under a local statute, is not tenable under Art. 226 of the Constitution and no writs available under that Article can be issued.

[14] Lengthy arguments, to seriously condemn the notification and the order dated 26-6-52, were addressed in this Court and it was also sought to be urged that in the absence of a temporary injunction, as prayed for, the petitioners would suffer an irreparable loss and substantial injury. In my opinion, however, it is not necessary to enter into the merits or de-merits of the said notification and the order, and in fact to my mind, such an attempt would be beyond the scope of this Court's jurisdiction while considering the main petition itself and much more so in consideration of the interim application. The main petition itself being untenable, the ancillary petition, for a temporary injunction, falls through and cannot be allowed.

[15] In this view, then, the application for temporary injunction, as sought is rejected with costs.

A/R.G.D.

Application rejected.

A. I. R. 1952 Bhopal 37

SATHAYE J. C.

Ganpatram and others — Defendants-Appellants v. Ramcharan and another — Plaintiffs-Respondents.

First Appeal No. 1 of 1951, D/-6-11-1951.

Court-fees Act (1870), S. 7 (iv) (f) and Sch. II, Art. 17 (vi)—Suit for partnership accounts — Proper court-fee on memo of appeal preferred from preliminary decree by defendant.

The proper Court fee on the memorandum of appeal by the defendants challenging the preliminary decree declaring the existence of partnership which was denied by them and for rendition of accounts is as on the valuation of the plaint under S. 7 (iv) (f) and not as fixed under Sch. II, Art. 17, Cl. (vi), Court-fees Act. Once the valuation for the suit is accepted that valuation would continue for the purposes of court-fee for all the proceedings taken in the suit as also in the subsequent proceedings.

(Note—In this case the suit was valued at a sum of Rs. 21,216 for purposes of court-fees and this valuation was not challenged). A. I. R. 1917 Mad. 668 (F. B.), *Foll.*; *Case law referred.*

[Paras 4, 8]

Anno. C. F. Act, S. 7 (iv) (f), N. 8.

Mohd. Yakub and B. L. Verma—for Appellants; G. P. Jaiswal—for Respondents.

REFERENCES/Courtwar/Chronological/

	Paras.
('22) A. I. R. 1922 All. 228: (44 All. 542).	5
('37) A. I. R. 1937 All. 465: (170 Ind. Cas. 119).	6
('34) A. I. R. 1934 Cal. 786: (152 Ind. Cas. 97).	7
('37) A. I. R. 1937 Lah. 694: (I. L. R. (1937) Lah. 196).	7, 8
('16) 39 Mad. 725: (A. I. R. 1917 Mad. 668 F. B.)	6, 7, 8
('38) A. I. R. 1938 Mad. 435: (I. L. R. (1938) Mad. 598 F. B.)	7
('43) A. I. R. 1943 Nag 13: (I. L. R. (1943) Nag. 17).	8
('47) I. L. R. (1947) Nag. 933: (A. I. R. 1948 Nag. 223).	3
('41) A. I. R. 1941 Oudh 622: (17 Luck. 246).	5
('35) A. I. R. 1935 Pat. 396: (14 Pat. 658 S. B.)	7
('27) A. I. R. 1927 Sind 100: (21 Sind L. R. 377).	7

Judgment.—This is an appeal by the defendants against the primary decree for dissolution of partnership and rendition of accounts in favour of the plffs-respondents. The suit was valued at a sum of Rs. 21,216 and odd for purposes of court-fees. The defts. denied the partnership and their

liability to render accounts. They now file this appeal and have paid court-fee of Rs. 10 only and a preliminary objection is raised by the respondents regarding it urging that the court-fee should be paid as on the plaint.

[2] The point for determination is what is the proper court-fee on the memorandum of appeal by the defts. challenging the preliminary decree declaring the existence of partnership which was denied by them and for rendition of accounts? Is it on the valuation of the plaint under s. 7 (iv) (f) or as fixed under sch. II, Art. 17, cl. (vi), Court-fees Act? On behalf of the appellants it is urged that it is not possible to assess the value of the decree and therefore the fixed court-fee alone could be paid. On the other side it is urged that it should be paid on the valuation of the plff's suit the decree in which is sought to be wholly set aside.

[3] Section 7, Para (iv), cl. (f) runs as below:—

"In suits for account according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

"In all such suits the plff. shall state the amount at which he values the relief sought."

It would thus appear that it is only the plff. who has been given a right under the law to state the amount at which he values the relief. Schedule II, Art. 17 (vi) runs as below:

"Plaint or memorandum of appeal in each of the following suits:—

Clauses (1) to (v). . . .

Clause (vi)—every other suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act. . . . Rs. Ten."

It would then appear that it has been held in several decisions of the different High Courts that even under s. 7 (iv) (f), the plff. is not left to his own arbitrary valuation of the claims, but is liable to put up a reasonable valuation in the light of the allegations in the plaint. Reference in this connection may be made to *Attar Singh v. Manohar Singh*, I. L. R. (1947) Nag. 933. In that case it has been observed:

"The Court will not ordinarily correct the plff's valuation except in a clear case where the disparity is so great as to show that the plff. has not endeavoured to fix a fair value at all but has simply set down a figure which is unreasonable and bears no relation to the value of the right litigated. It is entitled to reject the plaint if the plff's valuation is arbitrary and unreasonable and leave the plff. to correct the valuation or to have the plaint rejected."

It is thus obvious that the question of proper valuation of a claim for purposes of court-fees cannot be divested from the other allegations in the plaint. In the case on hand, the plffs. stated that in view of the statement as contained in the note of Diwali of 1946, they considered that a sum of over Rs. 21,000 may be due to them. The defts. denied the fact of partnership and their liability to render accounts, but defendant 1 admitted the execution of the note while the other defts. have not specifically denied it. It may be noted that none of them has challenged the valuation of the

suit as made by the plffs. for the purpose of court-fees.

[4] Now the question is whether in these circumstances the defts. can urge that the valuation of the preliminary decree dissolving the partnership and ordering the defts. to render accounts could not be assessed. In my opinion, the contention cannot be accepted. Even otherwise, the defts. challenging the preliminary decree in such suits, have to put up the same value in the appeal as in the plaint.

[5] The appellants' learned counsel referred to the decision in *Nanhesingh v. Ram Narain*, A. I. R. 1941 Oudh 622, where it is observed:

"In an appeal against a preliminary decree for accounts in a suit for profits it is not possible to estimate at a money value the subject-matter in dispute, the only question in appeal being whether the appellant is liable to render accounts, there being no decree against him for any specific amount."

I have perused the judgment and it appears that it was not a suit for rendition of accounts and this has been specifically pointed out. In regard to the question on hand, there is no discussion in support of the observation:

"I think it is not possible to estimate at a money value the subject-matter in dispute in the appeal filed in the lower court."

Reference is then made to the decision in *Kanhaiyalal v. Ram Sarup*, A. I. R. 1922 ALL. 228. A perusal of the judgment in that case clearly shows that there the defts. had challenged the valuation of the claim for purposes of court-fees in the trial of the suit itself. This has been pointedly referred to in the observation:

On the whole, taking the words of the Section as they stand, I think that the appellant is allowed the option of placing his own valuation upon the memorandum of appeal in a case like the present."

It is thus clear that in that case the decision was as stated above because the defts. had challenged the valuation of the claim from the beginning. That is not so in the case on hand.

[6] Reference was then made to the decision in *Haridas v. Murli Prasad*, A. I. R. 1937 ALL. 465, where it was held that

"the valuation in the plaint was intended by the plff. to be a valuation of the final decree and not of the preliminary decree. If the deft. had appealed against the final decree, he would have to pay court-fee on whatever sum was found due to the plff. But as the deft. had only appealed against the preliminary decree he was entitled to value that preliminary decree at any sum which he considered suitable."

This case fully supports the appellants and there is an observation which indicates that in that suit the plffs. valued the claim at Rs. 2,1000/- for a final decree and not for a preliminary decree. I have perused the judgment and do not find anything in support of this observation. In my opinion, that was obviously a tentative value as near as possible to the claim. The decision does not follow the view as found in *Srinivasacharlu v. Perindevaramma*, 39 Mad. 725 (F. B.).

[7] On the other side reference was made to the decision in *Firm of Mahomed Rahmoo Mawji v.*

Ibrahim Gangji, A. I. R. 1927 Sind 100, where it was held that:

"Where the plff. has obtained a preliminary decree for an account and the deft. or the plff. appeals against the decree, the valuation once fixed by the plff. must be adhered to unless the subject-matter of the appeal is not identical with that of the suit in which case, of course, it is open to the appellant to value the subject-matter of the appeal differently and to pay court-fees thereon."

The decision follows the case in *Srinivasacharlu v. Perindevaramma*, 39 Mad. 725 (F. B.) and a previous decision of the same High Court. In the decision in *Kailash Chandra v. Narayan Chandra*, A. I. R. 1934 Cal. 786 the same rule is laid down and it has been specifically pointed out that:

"Where therefore a suit on accounts valued at as. 1,200/- is decreed for Rs. 9154/- the appeal on such a decree should be valued at the enhanced sum."

In the decision in *Deoji Goa v. Tricumji Jivan Das*, A. I. R. 1935 Pat. 396 (S. B.), it was observed that:

"Where in a suit for dissolution of partnership and accounts a preliminary decree is passed, the deft. is entitled to place his own valuation which is not arbitrary upon the memorandum of appeal and the court is bound to accept the memorandum at this valuation. But it does not preclude a court hereafter from deciding on sufficient materials that the memorandum has in fact been undervalued and calling upon the deft. to correct his valuation."

The whole case-law has been discussed at length and though at the beginning it appears that the observations supported the valuation under Sch. II Art. 17 (vi), in the end reverted to the position that in such a case though the deft. values the memorandum of appeal at his own choice, still he could be called upon to pay the full court-fees on the ground that the memorandum has been undervalued, the best material in support of such order being the valuation and the allegations in the plaint. The decisions in (1) *Malik Feroz Din v. Malik Mohd. Din*, A. I. R. 1937 Lah. 694 and (2) *In re Dhannu Kodi Navakkar*, A. I. R. 1938 Mad. 435 (F. B.) fully support the contention of the respondents and it has been held that in such cases the court-fee is to be paid on the valuation as found in the plaint.

[8] In *Sheoram Sitaram v. Atma Ram Raghoji*, A. I. R. 1943 Nag. 13, it has been held, following the decision in *Malik Feroz Din v. Malik Mohd. Din*, A. I. R. 1937 Lah. 694 that:

"Where plff's suit for partnership accounts in the trial court was valued at Rs. 5250, for purposes of jurisdiction and court-fee, and it is against the decree passed in such a suit that an appeal is filed claiming dismissal of the suit in its entirety, the same valuation continues throughout the litigation and the deft.-appellant has no right to value the relief arbitrarily at a lesser figure."

It would thus appear that all the High Courts above referred to have consistently followed the decision in *Srinivasacharlu v. Perindevaramma*, 39 Mad. 725 (F. B.) and it has been held that once the valuation for the suit is accepted or decided, that valuation would continue for the purposes of court-fees for all the proceedings taken in the suit as also in the subsequent proceedings. I, therefore, find that the defts. in this appeal have to pay

the same court-fees for their appeal as paid on the plaint under s. 7 (iv) (f), Court-fees Act.

[9] It is, therefore, ordered that the appellants shall pay additional court-fee to make up the total court-fee as required above. As the learned Counsel for the appellant prayed for time to make up the deficiency, if any, it is ordered that it be made up on or before 4-12-51.

B/V.S.B.

Ordered accordingly.

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SATHAYE J. C.

Gangaram Nathuram — Applicant v. Beharilal Brijlal—Non-Applicant.

Misc. Judicial Case No. 7 of 1951, D/-28-9-1951.

(a) Civil P. C. (1908), O. 47, R. 3 — Application for review—Filing of copy of judgment, decree or order not necessary—(Limitation Act (1908), S. 12).

According to the practice of the Judicial Commissioner's Court at Bhopal copies of judgment and decree or copy of order sought to be reviewed are not required to be filed along with the application for review. Hence, an application for review filed within limitation is perfectly competent even if not accompanied with copies of judgment and decree. [Para 7]

The provisions of Cls. (2) and (3) of S. 12, Limitation Act, would be attracted only when copies of the judgment and decree or a copy of the order, sought to be reviewed accompany the application for review: 17 All. 213 (F.B.) ; A. I. R. 1938 Lah. 295, *Rel. on*; 4 Bom. 414, *Ref.* [Para 6]

Anno. C. P. C., O. 47, R. 3, N. 2, Pts. 3, 4; Limitation Act, S. 12, N. 29.

(b) Civil P. C. (1908), O. 47, R. 1 — Sufficient reason.

A review cannot be granted where the review is asked for to enable the applicant to raise points which he could and ought to have raised at the former hearing, especially when the point involves new allegation of fact. [Para 8]

Anno. C. P. C., O. 47, R. 1 N. 16b, Pt. 1.

(c) Civil P. C. (1908), O. 47, R. 1 — Sufficient reason.

A review cannot be granted where the petitioner seeks to reopen the same matter over again on frivolous and vexatious grounds. [Paras 9, 10]

Dicta: "It has been observed that the practice of filing review petitions on frivolous and vexatious grounds is becoming too common at this place and I would draw the attention of the Bar to the need of examining the law before the litigants are advised to rush to courts with such petition." [Para 12]

Anno. C. P. C., O. 47, R. 1, N. 16b.

(d) Civil P. C. (1908), O. 8, R. 5—Plaintiff claiming mesne profits at a particular sum per year—Defendant merely denying his liability for profits without any specific denial as to the quantum of profits—Defendant must be deemed to have admitted the quantum of profits claimed if his liability is established. [Para 11]

Anno. C. P. C., O. 8, R. 5, N. 2

R. C. Rai — for Applicant; Nihalani — for Non-Applicant.

REFERENCES: Courtwar/Chronological/ Paras.
(95) 17 All. 213 : (1895 All. W. N. 61 (F.B.)) 5
(51) Misc. Civil Case No. 11 of 1950-51, D/-6-2-1951 (Bhopal). 8
(79-80) 4 Bom. 414. 5, 6
(38) A. I. R. 1938 Lah. 295 : (175 Ind. Cas. 42). 5

Order.—This is a petition for review of the judgment and decree in second appeal No. 52 of

1950-51 in the Court of the Judicial Commissioner, filed by the respondent in the appeal.

[2] The non-applicant-plaintiff sued the applicant-defendant for possession of a portion of a land and the suit was decreed by the trial Court, but the first appellate Court dismissed it. The Court, however, in the above appeal set aside the decision of the first appellate Court and decreed the claim. The respondent in that appeal now seeks review of the said decision.

[3] The judgment in the second appeal was delivered on 22-11-50 and the application for review is filed on 20-2-51 without being accompanied by copies of the judgment and the decree, which, however, were filed only on 3-9-51. A number of grounds are stated in the petition for review which can be crystallised in the main grounds as below, viz:

(a) that the Court did not consider certain provisions of the Bhopal Land Revenue Act which went to the very root of the tenability of the suit;

(b) that the Court should have accepted the finding of fact that the agreement to reconvey was separate from the terms of the sale deed and should have held s. 92, Evidence Act, inapplicable;

(c) that the Court failed to notice the last portion of the sale deed which gave a right to the plaintiff to sue for refund of its consideration;

(d) that the Court had not properly appreciated the plea of fraud;

(e) that there was no evidence on the quantum of mesne profits in the absence of which no decree should be passed for such profits.

[4] On behalf of the non-applicant it is contended that copies of the judgment and decree, in the second appeal sought to be reviewed, should have been filed on record along with the application for review and in view of the delay in filing them, the petition was barred by time; that no petition for review could lie on the grounds raised.

[5] The first point for determination, therefore, is whether the copies of the judgment and decree sought to be reviewed should have been filed with the petition for review and if so, whether the application was barred by time and was liable to be dismissed. On behalf of the applicant it is contended that no such copies of the judgment and decree were required to be filed with the petition and as such the application, even without them filed on the 89th day since the date of the judgment was within time. Reference is made to the decisions in *Wajidali Shah v. Nawal Kishor*, 17 All. 213 (F.B.) and (2) *Jowandsingh v. Alasingh*, A. I. R. 1938 Lah. 295. The non-applicant refers to the decision in *Adarji Edulji v. Manikji Edulji*, 4 Bom. 414 in support of his contention.

[6] I have carefully perused all these three decisions. The contention of the non-applicant is that the provisions of R. 3 of O. 47 read with those of R. 1 of O. 41, Civil P. C. lay down the requirement of the copies of judgment and decree, sought to be revised, accompanying the petition for

review. It is also contended that s. 12, Limitation Act also indicates such requirement as under it, it is laid down that the period requisite for obtaining these copies shall be excluded while computing the period of limitation for an application for review. The decision of the Allahabad High Court above referred to takes notice of this contention with reference to the provisions of s. 625 read with those of s. 541, Civil P. C. of 1887 and the judgment of His Lordship Sir John Edge, Chief Justice deals with the contention as is now made before me. It would also appear that His Lordship has referred to the decision of the Bombay High Court in *Adarji Edulji v. Manikji*, 4 Bom. 414, and has remarked that the learned Judge, who decided that case, gave no reasons for the view that he held.

The contention on behalf of the non-applicant, on the basis of the provisions of s. 12, Limitation Act, has been dealt with at p. 216 and though I must confess that the reasoning does not appear to be entirely satisfactory, still that is a view which could be reasonably taken. My hesitation in accepting wholly the reasoning of His Lordship lies in the consideration that the provisions of cls. (2) and (3) of s. 12, Limitation Act, would be nugatory or would have no meaning if they are not enforced by the Court. To my mind, however, in the absence of any provision requiring filing of a copy of an award for an application to set it aside, the provisions of sub-cl. (4) of s. 12, Limitation Act are automatically nugatory. In my opinion, therefore, it is possible to hold, as has been held by His Lordship, the Chief Justice of Allahabad High Court, that the provisions of cls. (2) and (3) of s. 12, Limitation Act, would be attracted only when copies of the judgment and decree or a copy of the order, sought to be reviewed accompany the application for review. This view as expressed by the learned Chief Justice, has been accepted by not less than five judges of the same Court in the same case.

[7] It must also appear that at the time when the case came up to be heard by the Bench of the Allahabad High Court, it was not the practice to file copies of the judgment and decree or a copy of the order, sought to be reviewed, with the petition for review. That again was one of the considerations which influenced the Judges of the said High Court in taking the view they did. During the short course of the existence of the Judicial Commissioner's Court, so far as I know, it is not the practice to submit copies of judgment and decree or copy of an order sought to be reviewed, along with an application for review. In the circumstances, in my opinion, the contention of the applicant, that it was not necessary to file such copies with the petition, can be safely accepted. The same view has been taken by the Lahore High Court in the decision referred to above. The decision, however, does not seem to have considered the provisions of s. 12, Limitation Act, and

it is based apparently on the consideration of the futility of filing copies of the judgment and decree or copy of an order with an application for review because the very record, in which that judgment and decree or order were passed, was bound to be put up before the Court concerned, being its own judgment and decree or order. Agreeing with the decision in the above two cases, I find that copies of the judgment and decree, sought to be reviewed, were not required to be filed with the petition for their review. That being so, the present application filed on 89th day, is within time.

[8] The next point for determination is whether a review can be allowed on the grounds raised. The first ground is that the court did not consider certain provisions of the Bhopal Land Revenue Act. It is urged that the defendant was obviously a 'Shikmi' holder of the land and therefore, firstly the suit to eject him could not lie in a civil court and secondly that the transfer could not take effect without the sanction of the Nazim and reference is made to ss. 200 and 188, Bhopal Land Revenue Act. In my opinion, the contention is unsound and is also vexatious. It must firstly be pointed out that no such contention was made in the first appeal, much less in the second appeal and I am perfectly clear that it is nothing but an attempt to raise a point which the applicant could and ought to have raised in the appeal itself and no review can be granted on such a point. I would only refer to my own observations in Para 5 of my order D/- 6-2-1951 in *Mt. Mahmuda Begum v. Iftikhar Ali Khan*, Misc. civil case No. 11 of 1950-51 (Bhopal) where it has been observed :

"I must, however, make myself clear that a court has to deal with only the contentions raised before it and disputed. In a civil case, the parties are bound by their pleadings and their contentions, if any, and no court is entitled to look beyond the pleadings or the contentions as made before it. That being so, if no other point was pressed, it was beyond the powers of both the courts to examine other questions unless they were questions of law."

The learned counsel for the applicant urges that the point, which he has raised, is a question of law, as it goes to the very root of the tenability of the suit in a civil court. It must, however, appear that the contention is unsound in view of the fact that it is forgotten that the question involved a question of fact viz : whether the defendant was a Shikmi holder as defined in s. 2 (21), Bhopal Land Revenue Act (IV [4] of 1932). It was never the case of the defendant that he was a Shikmi holder and such allegation of fact now cannot be permitted to be introduced. That being so, I am clear that no review can be allowed on this ground.

[9] Taking up the grounds that the court should have accepted the finding of fact that the agreement to reconvey was separate from the terms of the sale-deed and should have held s. 92, Evidence Act inapplicable and that the court had not properly appreciated the plea of fraud, I am clear that

both the contentions have been dealt with in Paras. 4, 5 & 6 of the judgment and the present attempt to reagitate the point is nothing, but frivolous and vexatious.

[10] Taking up the ground as stated in cl. (c), noted in the earlier part of this order, that the court failed to notice the last portion of the sale-deed which gave the plaintiff a right to sue for refund of the consideration, that again has been dealt with in Para. 7 of the judgment. It must be remembered that a perusal of the last portion of the sale-deed would clearly indicate that the relief of refund of consideration was not the only relief made available under even that portion of the sale-deed, and if the plaintiff had, under the law, another relief available to him, there was nothing to confine him to merely the relief of refund of consideration alone. It was never pleaded by the defendant that this was the only relief available to the plaintiff and no other relief could be awarded and the present attempt is nothing, but to reopen the same matter over again which the petitioner cannot be allowed to do.

[11] Going over to the next ground viz : regarding the award of mesne profits in the absence of evidence in support of the quantum, an important rule seems to have been forgotten by the applicant in this behalf. A perusal of the plaint shows that the plaintiff claimed profits at the rate of Rs. 65 per year. In answer to this, the defendant applicant merely stated that he denied his liability for the profits. There was no specific denial of the quantum of the profits with the result that that portion could be deemed to be admitted. This would be perfectly clear from Para 4 of the additional pleadings in the written statement of the defendant. A perusal of Para. 8 of the judgment in the second appeal clearly indicates that firstly this contention was not even sought to be made while arguments were heard in the appeal and secondly it was, though briefly, still considered and as I have already observed, the contention could not be raised by the petition for review. In the circumstances, I am clear that no petition for review of the judgment and decree is tenable on the grounds raised in the petition.

[12] It has been observed that the practice of filing review petitions on frivolous and vexatious grounds is becoming too common at this place and I would draw the attention of the Bar to the need of examining the law before the litigants are advised to rush to courts with such petitions. The petition for review is, therefore, dismissed with costs and it is ordered that the applicant shall pay the costs of the non-applicant. Pleadings' fees for each party will be Rs. 50 if certified in time.

B/K.S.

Petition dismissed.

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SATHEY J. C.

Mohd. Siddique and another — Applicants v. Nandkishor and another — Non-Applicants.

Civil Revision No. 12 of 1951, D/- 1-10-1951.

1952 Bhopal/6

(a) Civil P. C. (1908), O. 9, R. 9—Order of restoration made, subject to payment of costs of defendants by certain date — Costs paid and accepted by defendant's pleader — Restoration cannot be challenged — (Evidence Act (1872), S. 115) : A. I. R. 1930 Mad. 268, *Rel. on.* [Para 4]

Anno. Evi. Act, S. 115, N. 8, 24, 25; C. P. C., O. 9, R. 9, N. 13.

(b) Civil P. C. (1908), O. 9, R. 13 — Application for restoration by pleader's clerk, whether in order.

In order that an application presented by the pleader's registered clerk should be in accordance with law, it should bear not merely the signature of the party but also the signature of the pleader, so as to indicate that the clerk was acting on behalf of his master : S. A. No. 62 of 1950-51, D/- 8-11-1950 (Bhopal), *Rel. on.* [Para 6]

Anno. C. P. C., O. 9, R. 13, N. 15.

(c) Civil P. C. (1908), O. 9, R. 13 — Restoration application presented by pleader's clerk — No objection that presentation was not proper, taken—It must be deemed to have been waived — (Evidence Act (1872), S. 115) : A. I. R. 1924 Lah. 296, *Rel. on.* [Para 7]

Anno. Evi. Act, S. 115, N. 8, 24; C. P. C., O. 9, R. 13, N. 2, 15.

Kazi Mohd. Umar — for Applicants ; R. J. Rai and Nihalani—for Non-applicants.

REFERENCES: Courtwar/Chronological/	Paras
('50) S A No. 62 of 1950-51, D/- 8-11-1950 (Bhopal).	6
('24) A I R 1924 Lah 296 : (69 Ind Cas 365).	7
('97) 20 Mad 87 : (2 Weir 470).	6
('30) A I R 1930 Mad 268 : (123 Ind Cas 337).	4
('39) A I R 1939 Rang 1 : (180 Ind Cas 565).	6

Order.—This is a revision by the defendants non-applicants, against the order dated 27-1-51 restoring a suit to file passed by the Subordinate Judge, Begumganj.

[2] The suit for a sum of Rs. 5694 was, after the whole of the evidence except of one witness, pending in the Court of the Subordinate Judge, Begumganj, fixed for 8-11-50, when it was dismissed for default, in the presence of the defendants. An application dated 23-12-50 was filed in that Court on 26-12-50 alleging that an application dated 2-12-50 was filed on 6-12-50 by Abdul Rashid Beg, Clerk of Shri R. C. Rai, Advocate in that very Court, but was returned by the Judge without any order as the record was said to be at Raisen and therefore it was filed in the Munsiff's Court at Raisen who returned it on 8-12-50 for presentation to the proper Court but it was actually returned on 23-12-50 and therefore it was filed on that latter date. The reasons for the non-appearance of the plaintiffs on 8-11-50 were also stated and supported by an affidavit. The allegations were denied by the defendants who also contended that the application was barred by time. The Subordinate Judge, on 27-1-51 restored the suit to file subject to payment of Rs. 80 as cost which the defendants' pleader received and the suit was restored.

[3] The defendants now come up with this revision petition and contend that no application was filed in the Court of the Subordinate Judge on 6-12-50 and even if it was filed, it was not properly presented and as such the application dated 23-12-50 was barred by time. The non-applicants contended that the application was presented, on 6-12-50, by the pleader's clerk, but it was returned

though properly presented by the clerk, and was thus within time; that no such objection was raised in the lower Court and it could not be raised now; that the defendants' pleader having received the cost for restoration of the suit, cannot challenge the order.

[4] The first point for determination, therefore, is whether the applicants (can?) challenge the order despite their pleader accepting the costs for restoration of the suit. It must appear that the order of the Court was that the application for restoration was allowed on payment of Rs. 80 as cost which were to be paid on the next date. It was further ordered that if the costs were not paid, the order shall stand cancelled. There is no denying of the fact that this amount of Rs. 80 was received by the pleader's clerk and that the suit was restored at the next hearing. It would thus appear that the defendants through the pleader, accepted the order of the lower Court in so far as it related to the payment and receipt of the cost of restoration. The question, therefore, would be whether they can accept one part of the order and challenge the rest. The principle was discussed in a decision of the Madras High Court in *Venkatarayudu v. Rama Krishnappa*, A.I.R. 1930 Mad. 268 and it was observed that:

"When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff's paying the costs of the opposing party, there is no intention to benefit the latter except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order. But if a party receives benefit receiving his right to object to the order, he will not in that case be precluded from attacking it."

It is thus obvious that the principle of estoppel is applied to the circumstances and the decision fully applies to the case on hand. In the circumstances, I find that the defendants (who?) have received, through their pleader, the cost for restoration of the suit, cannot now challenge the order of restoration and their revision petition is liable to be dismissed on this ground alone.

[5] The next point for determination is whether the application dated 2-12-50 was properly presented on 6-12-50 in the Court of the Sub-Judge, Begumganj. The application dated 23-12-50 had clearly stated the circumstances under which it was filed on that date. Along with it was filed the application dated 2-12-50 on which the Munsiff, Raisen has endorsed his order on 8-12-50. The question was whether the application was presented to the Sub-Judge, Begumganj, on 6-12-50. In this connection it is worthwhile to examine the affidavits of not only the non-applicant, Nandkishor, but also of the applicant, Mohd. Siddique himself, which have been filed on this record. Nandkishor, in his affidavit dated 11-6-51 affirms the allegations which he has made not only in the lower Court, but also in this Court. The affidavit of Mohd. Sid-

dique, the applicant, in paras 1 & 2 partly supports the allegations in the matter of Abdul Rashid Beg's going to Raisen on 7-12-50 and stating to a pleader at that place that he had come to file an application for restoration and it was returned by the Munsiff, Raisen for presentation to the proper Court. It would thus appear that the allegations of Nandkishore, in his affidavit, appear to be not only correct, but also true. A report had to be called from the Sub-Judge in this matter in the absence of any order on the application dated 2-12-50 passed by him and except for the date on which the application was presented to him, he also supports the allegations of Nandkishore as stated in the affidavit. In fact these allegations should have been challenged by the defendants in the lower Court itself, but it appears that they did not do so as no statement seems to have been filed by them to counter the application dated 23-12-50 on facts. In view of the affidavits and the report of the Sub-Judge dated 4-7-51, I find that an application for restoration was presented by Abdul Rashid Beg, on 6-12-50 in the Court of the Sub-Judge.

[6] The question then arose as to whether the pleader's Clerk had power to present the application to the Court concerned. I have seen the application which was presented to the Munsiff, Raisen on 8-12-50 and I find that it is signed by Shri Rai, admittedly the pleader for the plaintiffs. It is thus obvious that it was authorised by the pleader and the only matter which was left over, was the actual presentation of the application to the Court and this was done by Abdul Rashid Beg. It is also obvious from the affidavits of the parties filed on this record that Abdul Rashid Beg was Shri Rai's registered clerk and it has been held in *Mohansingh v. Raghunathsingh*, second Appeal No. 62 of 1950-51 in the Court of the Additional Judicial Commissioner, decided on 8-11-50 that: "the presentation by a pleader's Clerk was not contrary to law." The decisions in *Sawarmal v. Kunjilal*, A. I. R. 1939 Rang. 1 and *Queen-Empress v. Karuppa Udayan*, 20 Mad. 87 have been relied upon. I am in respectful agreement with the observations of my learned brother in his above decision and I find that the application filed by Abdul Rashid Beg on 6-12-50 was properly presented as he was a registered clerk. I would only add a proviso that an application presented by a pleader's Clerk should bear the signature of the pleader, and not merely of the party, so as to indicate that the Clerk was acting on behalf of his master, the pleader.

[7] It would also appear that in the case on hand, no such objection was raised, by the defendants to the presentation of the application by the pleader's Clerk and it must be deemed to have been waived and cannot be now allowed to be raised for the first time in appeal or revision. I would refer to the decision in *Gopal Singh v. Bhaga*, A. I. R. 1924 Lah. 296.

[8] In the circumstances, the revision petition is dismissed with costs and the applicants are ordered to pay the costs of the non-applicants in this Court. Pleders' fees will be Rs. 20 for each party if certified in time. The parties shall appear in the lower Court on 22-10-51.

B/R.G.D. Revision dismissed.

A. I. R. 1952 Bhopal 43

SATHEY J. C.

Hashmat Rai, Applicant v. Lalchand and another, Non-applicants.

Civil Revn. No. 47 of 1951, D/- 23-10-1951.

(a) Civil P. C. (1908), O. 17, Rr. 2 and 3 — Distinction between Rr. 2 and 3.

If the party or parties, to whom time has been allowed, is or are absent, it is not R. 3 that is to be followed, but it is R. 2 that is to be looked to. The wording of these two rules makes it perfectly clear that the one is exclusive of the other. Rule 2 applies when the party is absent i.e. does not appear while R. 3 applies when the party is present.

Hence, the order that can be passed in the absence of the plaintiff at the date of the adjourned hearing can be only under O. 17, R. 2 and not R. 3 of the said Order. *Case law referred.* [Para 5]

Anno. C. P. C., O. 17 R. 3 N. 3.

(b) Civil P. C. (1908), O. 17, Rr. 3 and 2 — Order passed under R. 3 instead of R. 2—Remedy of aggrieved party.

Where an order dismissing a suit has been expressly passed under O. 17, R. 3, instead of under R. 2, it is not for the Court to correct its own mistake and treat the order under O. 17, R. 2. In the circumstances, the remedy of the party aggrieved by the order is by way of appeal only and not by way of an application for restoration under O. 9, R. 9; A. I. R. 1925 Bom. 328 & A. I. R. 1948 Mad. 80, *Dissent.*; A. I. R. 1940 All. 217, *Disting.*; A. I. R. 1944 All. 211, *Rel. on.* [Para 6]

Anno. Civil P. C., O. 17 R. 3 N. 7.

(c) Civil P. C. (1908), O. 9, R. 9—Application for restoration—Tenability challenged as preliminary ground — Decision on merits without hearing evidence on both sides is improper.

Where tenability of an application for restoration of a suit to file under O. 9, R. 9 is challenged as a preliminary ground, clearly indicating that on the decision of the preliminary objection he might adduce evidence to rebut the facts alleged by the applicant, it is improper for the Court to proceed to decide the application on merits without hearing the evidence on both sides. [Para 7]

Anno. Civil P. C., O. 9 R. 9 N. 13.

(d) Civil P. C. (1908), O. 19, Rr. 1 and 2 and O. 9, R. 9 — Applicability of O. 19, Rr. 1 and 2 — Suit dismissed for default — Application for restoration—Additional affidavits filed on record by plaintiff without being called for by the Court—Affidavits by different persons sworn to facts in exactly similar expression—No opportunity to defendant to counter allegations in affidavits — Court held could not either under O. 19, R. 1 or R. 2 act on these allegations: A. I. R. 1942 Oudh 350, *Disting.* [Para 7]

Anno. Civil P. C., O. 19 R. 1 N. 7.

(e) Civil P. C. (1908), O. 9, R. 9—Conditional order for restoration — Restoration on condition of payment of cost—Part of cost deposited and withdrawn by non-applicant — Estoppel against non-applicant from challenging order for restoration — (Evidence Act (1872), S. 115).

Where an application for restoration of a suit dismissed for default is allowed subject to the payment of cost to the non-applicant and the applicant (plaintiff) deposits only a part of the cost which is withdrawn by the non-applicant,

the plaintiff himself, not having complied with the order passed by the Court, cannot seek to estop the defendant (non-applicant) from challenging the order of restoration on the principle of estoppel: A. I. R. 1930 Mad. 268, *Disting.* [Para 9]

Anno. Civil P. C., O. 9 R. 9 N. 10a;
Evidence Act, S. 115 N. 52.

Nihalani — for Applicant; Chugani — for Non-applicant No. 1.

REFERENCES: Courtwar/Chronological /Paras.
(40) A I R 1940 All 217: (188 Ind Cas 414). 6
(44) A I R 1944 All 211: (I L R (1944) All 297). 6
(51) Civil Revn. No. 12 of 1951 : (A I R 1952 Bhopal 41). 9
(25) A I R 1925 Bom 328: (87 Ind Cas 710). 6
(41) A I R 1941 Bom 83: (I L R (1941) Bom 150). 5
(43) A I R 1943 Bom 321: (I L R (1944) Bom 1 F B). 5
(32) A I R 1932 Lah 477: (138 Ind Cas 200). 5
(30) A I R 1930 Mad 268: (123 Ind Cas 337). 9
(48) A I R 1948 Mad 80: (1947-1 Mad L J 271). 6
(30) A I R 1930 Nag 152: (127 Ind Cas 351). 5
(42) A I R 1942 Oudh 350: (18 Luck 104). 7
(30) A I R 1930 Rang 270: (8 Rang 168). 5

Order. — This is a revision petition by defendant 1 against the order dated 23-6-51 of the Subordinate Judge, Bhopal, restoring the non-applicant No. 1 plaintiff's suit dismissed under O. 17, R. 3, Civil P. C., on 7-5-51 to file.

[2] The suit was fixed for plaintiff's evidence on 21-4-51, but was adjourned, subject to payment of Rs. 25 as cost, to 7-5-51, as his witnesses were not summoned. On 7-5-51 the plaintiff was absent and his counsel stated that he had no instructions; the cost of Rs. 25 was also not paid and the Court therefore dismissed the suit under O. 17, R. 3, Civil P. C.

[3] On 29-5-51 the plaintiff filed an application for restoration of the suit to file on the ground that he was taken ill and had gone to Bombay before 21-4-51 asking his counsel to seek an adjournment, that he was not informed of the order for cost or the date of the next hearing and hence could not give any instructions nor could he pay the cost; that the mention of O. 17, R. 3 in the order dated 7-5-51, was an accidental error for order O. 17, R. 2 and the application was thus tenable. Defendant 1 denied the allegations and contended that the application was not tenable and stated that the question be decided as a preliminary objection. The Subordinate Judge held that the dismissal should have been under O. 17, R. 2 and the application was, therefore, tenable, and without calling for evidence and merely relying on the affidavits filed on behalf of the plaintiff, restored the suit to file on 23-6-51. It is this order that is challenged.

[4] The applicant contends that the order passed on 7-5-51 was properly under O. 17, R. 3 and therefore, no application for restoration of the suit to file was tenable. The point for determination is whether the order should have been under O. 17, R. 2 or R. 3, Civil P. C. Rule 2 runs as below:

"Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. 9 or make such other order as it thinks fit."

It would thus appear that the first essential, which the Court has to look into while dealing with R. 2, is the appearance of the parties. If the parties or any of them are or is absent, the Court can proceed to dispose of the suit in the modes available under O. 9. The crux of the question, therefore, is whether the party or parties was or were present in Court. Rule 3 of the order runs as below:

"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith."

It would thus appear that the provisions of this rule are to be followed in the presence of the parties or party to whom time has been allowed. If the party or parties, to whom time has been allowed is or are absent, it is not this rule that is to be followed, but it is the R. 2 that is to be looked to. The wording of these two rules makes it perfectly clear that the one is exclusive of the other. Rule 2 applies when the party is absent i.e. does not appear while R. 3 applies when the party is present. In the case of the plaintiff his non-appearance would lead to the application of R. 2 and not R. 3 and, therefore, the suit was liable to be dismissed under O. 17, R. 2, on 7-5-1951, when it was fixed for hearing.

[5] It is contended that on 7-5-1951 if the plaintiff had appeared and his witnesses were absent and the cost had not been paid, then the order would have been under R. 3 of O. 17 and therefore, he should not be placed in a better position by his non-appearance on that date and therefore, should not be allowed to take advantage of an application for restoration. This contention loses sight of the fact that if the plaintiff had appeared, it would have been possible for him to produce his witnesses or to explain their absence and could have paid the cost as ordered at the previous hearing. The contention therefore, is not sound. In *Abdul Karim v. Ratilal Gujrati*, A. I. R. 1930 Nag. 152, it is held that :

"Rules 2 and 3 are mutually, exclusive. Rule 3 contemplates the presence of parties and only deals with a case where such party being present has failed to produce his evidence or to take any other steps laid down in the rule. Rule 2 applies in the case of the absence of a party or parties whether or not time has been granted to them to do any of the acts laid down in R. 3."

In *Ko Tha Lin Bwin v. Ko Hla Kye*, A. I. R. 1930 Rang. 270, the same principle is accepted. It may be pointed out that both these cases were of an application for setting aside an *ex parte* decree, but the principle as laid down in A. I. R. 1930 Nag. 152, holds good. The decision in *Madan Gopal v. Budhu*, A. I. R. 1932 Lah. 477, follows suit. In *Rukmansa Rajansa v. Shankargouda Basangouda*, A. I. R. 1941 Bom. 83, it is observed that :

"Where a case is adjourned under O. 15 R. 3 for the production of evidence and the plaintiff fails to appear on the adjourned date, the Court under O. 17, R. 2 is bound to dispose of the matter under O. 9, R. 8, Civil P. C., or

else to grant an adjournment. It is not open to it to dispose the case on merits in the absence of evidence. Order 17, R. 3 has, however, no application to such a case."

This decision has been approved in *Basalingappa Kushappa v. Shidramappa Irappa*, A. I. R. 1943 Bom. 321 (F. B.). In the circumstances, in my opinion, the order that could be passed on 7-5-1951 in the absence of the plaintiff at the date of the adjourned hearing could be only under R. 2 of O. 17 and not R. 3 of the said order.

[6] It was then contended that when the Court had passed an order under R. 3, it could not correct its own error and treat it as an order under R. 2 and entertain an application for restoration of the suit to file and that an appeal and not an application to restore the suit was tenable. On the opposite side, reference is made to *Basayya Ayappa v. Allayya Maharudrayya*, A. I. R. 1925 Bom. 328, where it is observed that :

"If a party fails to appear at an adjourned hearing, the proper order for the trial Court to pass is one under R. 2 and not under R. 3 but if it proceeds under R. 3 and dismisses the suit on merits, it is the trial Court and not the appellate Court which can consider if the plaintiff had sufficient cause for non-appearance."

I have perused this case and it appears that no consideration is made of the law that a Court could not review and correct its own order unless it falls within the ambit of O. 47, R. 1, Civil P. C. The judgment is too short to admit of any discussion on the relevant question. The decision in *Raja Singh v. Manna Singh*, A. I. R. 1940 ALL. 217, refers to an order under R. 3 of O. 17, Civil P. C., read with R. 13 of O. 9. In that case, the Court had remarked that it was proceeding under O. 17, R. 3 in the absence of the defendant. It was held that an application, to set aside an *ex parte* order, was tenable under R. 13 of O. 9. In my opinion, this decision cannot help in view of the existence of the specific provision of R. 13 of O. 9. Reference is then made by the non-applicant to the decision in *Venkataratnam v. Apparao*, A. I. R. 1948 Mad. 80, where it is observed that :

"Where the Court has proceeded under O. 17, R. 3 and dismissed the suit on merits, the plaintiff can either appeal against that decision or proceed under O. 9, R. 9."

This again, as the case in A. I. R. 1925 Bom. 328, does not consider the question of the Court reviewing and correcting its own order. The judgment is too short and does not contain discussion or consideration of the incapacity of the Court to review and correct its own order. In *Udai Ram Gopi Ram v. Raghuraj Singh Khubchand*, A. I. R. 1944 ALL. 211, it is laid down that :

"No doubt it lies with the Court to decide the case on merits on the postponed date of hearing, but the absence of the party or his failure to produce evidence must be without reasonable excuse. Once the Judge has passed the order under R. 3 and not under R. 2, he has no jurisdiction to set it aside."

I have considered the whole question in the light of the contentions and in my opinion, the Court having once applied its mind to the circumstances of the case and rightly or wrongly decided it, it is not for that very Court to correct its own mistake

as the learned Subordinate Judge seems to have done in the case on hand. It is, no doubt, true that the order should have been under R. 2 and not R. 3 of O. 17, but in my opinion, it was not for that Court to correct its own mistake and treat the order under a provision different from the one expressly mentioned by it in its own order. In the circumstances, in my opinion, the remedy of the plaintiff in the case was by an appeal and not by an application for restoration of the suit and the application, therefore, did not lie.

[7] It was then contended that the order is improper as no opportunity was given to the defendant to adduce evidence in rebuttal and the affidavit filed by the plaintiff along with the application could not be relied upon. A perusal of the written statement filed by the defendant clearly shows that he challenged the tenability of the application as a preliminary ground and sought the Court's decision on that point, clearly indicating that on the decision of the preliminary objection he might adduce evidence to rebut the facts alleged by the applicant-plaintiff. It was, therefore, improper for the Court to proceed to decide the application on merits without hearing the evidence on both sides. It appears that some time till 23-6-1951 three additional affidavits were filed by the plaintiff on record. These three affidavits are by different persons sworn to facts in exactly similar expression. It was not the Court who had called for these affidavits. No affidavit was called from the defendant to counter the allegations. In the circumstances, the Court could not, either under O. 19, R. 1, or R. 2, act on these affidavits filed on record. In fact it is not known when the three affidavits, sworn in by different persons, were filed on record. The learned counsel for the non-applicant refers to the decision in *Shib Sahai v. Tika*, A. I. R. 1942 Oudh 350, where it is observed that :

"It is open to a Court on sufficient grounds to allow proof of facts by means of affidavits. Therefore in an application by the plaintiff for setting aside a dismissal of his suit for default, the affidavit filed by him along with his application can be used as evidence on the facts alleged therein and it cannot be rejected merely because there had been a verbal denial by the defendant without any attempt to controvert it by a counter affidavit or without asking for the attendance of the plaintiff for the purpose of cross-examination."

It would, however, appear that in that case an opportunity was given to the defendant to counter the allegations in the affidavit of the plaintiff and he had not availed of it. In the case on hand, no such opportunity was given to the defendant and the case was adjourned from 11-6-1951 to 13-6-1951 only for arguments on the preliminary objection to the tenability of the application itself, particularly when the defendant had reserved his right to adduce his evidence in rebuttal of the affidavit filed by the plaintiff. The decision of the Oudh Court above referred to, therefore, is liable to be distinguished. In the case on hand the application for restoration of the suit

could be sent back for reconsideration after affording an opportunity to the defendant to adduce evidence. As it has been, however, held that the application itself was not tenable in law, it is not proposed to send back the case to the lower Court.

[8] The next contention of the applicant is that the grounds for non-appearance of the plaintiff were not proper and sufficient. This is a contention which could be decided only after the facts in the application were held proved after evidence, on both sides and as such it is not possible to decide this question.

[9] On the other side the non-applicant contends that the defendant cannot challenge the order of the lower Court as he had received the cost for the restoration of the suit and reference is made to the decision in *Mohammed Siddique v. Nandkishor*, civil Rev. No. 12 of 1951, dated 1-10-1951 of the Judicial Commissioner's Court. The decision is before me and it refers to the decision in *Venkatarayudu v. Rama Krishnayya*, A. I. R. 1930 Mad. 268, where the principle of estoppel was applied to the circumstances in the case then on hand. It would, however, appear that in the present case, the order of the lower Court was that the applicant shall pay not only a sum of Rs. 25 already awarded to the non-applicant but a further sum of Rs. 10 in addition, the Court observing that the application was allowed subject to the payment of the above cost. The plaintiff deposited not a sum of Rs. 35 but only a sum of Rs. 30 on 12-7-1951 and the amount was withdrawn by the non-applicant on 19-7-1951. The plaintiff, therefore, had not himself complied with the order of the Court dated 23-6-1951 in the matter of the payment of cost awarded to the non-applicant. It was urged that in a previous order dated 17-2-1951 in the suit, he was awarded cost of Rs. 5 to be paid by the non-applicant and therefore, that amount not having been paid, was deducted from the sum of Rs. 35 and the balance was deposited on 12-7-1951. In my opinion, no such accounting could be made in order to get over the specific order for cost to be paid by the plaintiff to defendant 1. In the circumstances, the plaintiff himself not having complied with the order passed by the Court, could not seek to estop the defendant from challenging the order of the lower Court on the principle of estoppel as laid down in A. I. R. 1930 Mad. 268.

[10] The result is that the application for restoration of the suit to file, was not tenable in law and the revision is thus allowed with costs against non-applicant 1 who shall bear his own costs. The order, setting aside the dismissal of the suit and restoring it to file, is, therefore, set aside. Counsel's fees in this Court will be Rs. 30 for each side.

B/V.B.B.

Revision allowed.

A. I. R. 1952 Bhopal 45

SATHEY J. C.

Abdul Naim Khan v. The State.

Criminal Revn. No. 11 of 1950, D/- 24-5-1952.

(a) Criminal P. C. (1898), S. 117 — Effect of consent to give security.

The mere consent or willingness of the applicants to furnish security does not amount to a plea of guilty. Whether the willingness amounts to such plea depends upon the facts and circumstances of each case : *Case law Rel. on.*

[Paras 7, 8]

Anno. Cr. P. C., S. 117, N. 3.

(b) Criminal P. C. (1898), S. 107 — Apprehension of breach of peace.

The preliminary order or notice indicated that according to the Magistrate, the applicants were feared to commit breach of peace at the time of approaching Moharram and Deshra holidays simply because they had filed an application to the police that the feelings of the Muslims were injured by the passing of the procession in celebration of the Mahatma Gandhi Jayanti alongside the mosque. The Sub-Inspector of Police in his evidence stated that the statements in the application were found to be incorrect and, therefore, he concluded that the applicants might commit breach of peace at the time of the Moharram and Deshra holidays which were about a week ahead :

Held, that there was absolutely nothing as required by law on which such an apprehension could be justified. The very proceedings were, therefore, unjustified and much more so the order.

[Para 9]

Anno. Cr. P. C., S. 107, N. 10.

*Mohammad Ali—*for Applicants; *Government Advocate—*for the State.

REFERENCES: Courtwar/Chronological/

	Paras
(28) A. I. R. 1928 All. 357 : (30 Cri. L. J. 122).	8
(08) 35 Cal. 674 : (8 Cri. L. J. 128).	7
(36) A. I. R. 1936 Cal. 292 : (37 Cri. L. J. 818).	7
(29) A. I. R. 1929 Lah. 504 : (30 Cri. L. J. 839).	7
(07) 30 Mad. 330 : (6 Cri. L. J. 278).	7
(18) A. I. R. 1918 Nag. 140 : (20 Cri. L. J. 105).	7
(20) A. I. R. 1920 Nag. 145 : (21 Cri. L. J. 656).	7

Order.—The applicants seek to revise the order dated 4-10-1951 of the Sub-Divisional Magistrate, Ashta, ordering them to furnish security for Rs. 1,000 each for keeping peace for a period of three months. Their appeal against the order is dismissed.

[2] The facts of the case are stated in the orders of both the lower Courts and need not be repeated. The points pressed in this Court are: (i) that the original and appellate Courts misunderstood that by the statements of the applicants, in reply to the preliminary order and the notice, they had consented to furnish the security and it is urged that they agreed to furnish the security only for bail during the proceedings; (ii) that they had denied the allegations against them and there was no evidence on record to justify the order.

[3] The preliminary order or notice dated 4-10-1951 clearly indicates that according to the Magistrate, the applicants were feared to commit breach of peace at the time of approaching Moharram and Deshra holidays simply because they had filed an application to the police that the feelings of the Muslims were injured by the passing of the procession in celebration of the Mahatma Gandhi Jayanti alongside the mosque. To this the applicants replied that they had signed the application prepared by one Kallu Master who told them that it was against the new road by which the procession had passed. They added that they were not even present at the mosque at the time and lastly

that they were prepared to furnish security. One of them stated that he was willing to furnish a bond as desired by the Police.

[4] The applicants, it must be remembered, were no doubt taken to the Court in custody on that date but it does not appear that the contention, that they offered to furnish security only for being released on bail during the proceedings, is correct. Their statements were in reply to what was read out to them from the preliminary order. They denied the allegations and even explained why they had signed the application filed to the Police. Naturally, however, they wanted to be released from custody and therefore, offered to furnish security. This is further supported by the fact that Applicant no. 3 Akbar Ali specifically stated that he would furnish a bond as desired by the Police.

[5] It seems, however, equally clear from the orders of both the Courts below that they considered that the applicants had pleaded guilty, to what amounted to a charge against them, because they consented to furnish the security. They have not considered the denial of the allegations by the applicants. As such it has to be pointed that the Courts could not act on the plea construing it to be one of guilty and in my opinion, could not even consider it as anything beyond a denial of the charge.

[6] The Magistrate appears to be in two minds on the consent of the applicants. He seems to have considered that it was a plea of guilty but yet went on to record evidence. The proceedings under s. 107, Criminal P. C., are, under the law, conducted by the procedure for the trial of a summons case, but if the Magistrate had accepted the consent as a plea of guilty or admission, he could have proceeded under s. 243, Criminal P. C., and the fact, that he did not do so, indicated that he was not satisfied with the plea. But when that was so, he seems to have based his order more on the mere willingness of the applicants to offer security than the evidence as is found in the last para of his order. It is, therefore, that the order was illegal and improper and cannot be sustained.

[7] Most of the High Courts have pointed out that the mere consent or willingness to furnish security does not amount to a plea of guilty, as found in *Ram Chandra Halder v. Emperor*, 35 Cal. 674, *Superintendent and Remembrancer of Legal Affairs, Bengal v. Jiban Kumar De*, A. I. R. 1936 Cal. 292, *Ujagar Singh v. Emperor*, A. I. R. 1929 Lah. 504, *Prathipati Venkatasami v. Emperor*, 30 Mad. 330, *Emperor v. Rai Singh*, A. I. R. 1918 Nag. 140 and *Prabhudas v. Emperor*, A. I. R. 1920 Nag. 145.

[8] The Allahabad High Court, in *Emperor v. Kurwa*, A. I. R. 1928 ALL. 357, has held that : "Whether the willingness amounts to such plea depends upon the facts and circumstances of each case." In that case the person proceeded against denied the allegations and yet offered to furnish

security and it was held that "it did not amount to a plea of guilty." I respectfully agree with this view and find that the readiness of the applicants, to furnish security in the case on hand, cannot be construed as a plea of guilty and could not be acted upon.

[9] Turning to the evidence on record it is clear that the witness Sub-Inspector of Police was not present with the procession and thus could not state anything regarding what happened near the mosque. In fact the apprehension of the commission of the breach of peace appears to have been based on the fact that the applicants were parties to an application filed to the Police as found in Ex. P-3. The witness stated that the statements in the application were found to be incorrect and therefore, he concluded that the applicants might commit breach of peace at the time of the Moharram and Deshra holidays which were about a week ahead. I am clear that there was absolutely nothing as required by law on which such an apprehension could be justified. The very proceedings were, therefore, unjustified and much more so the order. Apart from this I cannot close this order without observing that even if the order, calling upon the applicants to furnish security for keeping peace, was entitled to be upheld still the amount of security called for was unreasonably high considering the status of the applicants. As the order, however, cannot be sustained it is not necessary to pursue the matter.

[10] It is ordered that the revision is allowed and the order of the Sub-Divisional Magistrate, Ashta, dated 4-10-1951, calling upon the applicants to furnish security to keep peace, is set aside and the bonds executed in that behalf are discharged.

B/D.H.

Revision allowed.

A. I. R. 1952 Bhopal 47

SATHEY J. C.

Tufail Ahmad — Defendant — Applicant v. Anwar Ahmad — Plaintiff — Non-applicant.

Civil Revn. No. 58 of 1951, D/- 25-10-1951.

(a) Civil P. C. (1908), S. 115—Interlocutory orders—Admissibility of document.

The ordinary rule is that the Judicial Commissioner's Court refuses to interfere in a case at an interlocutory stage except in extreme cases : [Para 3]

Held if the question of admissibility or otherwise of the document was not examined at the early stage to which the suit had reached, there was a possibility of multiplicity of proceedings in case the decision was against the defendant and if the appellate Court did not agree with the view of the trial Court its finding would entail a remand and a fresh decision and an appeal over again. To avoid such multiplicity, therefore, the Judicial Commissioner's Court should examine the question and decide it. [Para 3]

Anno. Civil P. C., S. 115, N. 5.

(b) Registration Act (1908), Ss. 17 and 49, Proviso—Agreement to divide property—Admission for collateral purpose.

No question of severance of interest arises in the case of Mohammadians as in the case of a joint Hindu family or coparcenary.

Where the document was prepared with a view to an agreement towards an amicable division of the property of the father, and it was not said that as per this document

different items of the property were allotted to the brothers and transfers were effected, but the document proposed that particular steps *should be* and not *have been* taken in respect of the different items of the property :

Held the document read as a whole evidenced not accomplishment of the transfer or creation or extinction of any interest in the immoveable property, but a mere proposal to do so. The document was not a deed of partition, but fell within the ambit of cl. (v) of sub-s. (2) of S. 17 and as such was not compulsorily registrable and was thus admissible in evidence. Even if, the document was compulsorily registrable, under the proviso to S. 49, it was admissible to prove a collateral transaction viz., the admission of the plaintiff that no part of the consideration for the sale-deed of the property sought to be divided was paid by the plaintiff : *Case law discussed.* [Paras 5, 6, 7, 8]

Anno. Reg. Act, S. 17, N. 53 ; S. 49, N. 7, 18.

Mohd. Yakub—for Applicant; R. Panjwani—for Non-applicant.

REFERENCES : Courtwar/Chronological/	Paras
('29) A.I.R. 1929 Cal. 636 : (121 Ind. Cas. 409)	8
('30) A.I.R. 1930 Cal. 559 : (126 Ind. Cas. 715)	8
('21) 61 Ind. Cas. 328 (Lah.)	8
('29) A.I.R. 1929 Nag. 115 : (118 Ind. Cas. 57)	8
('38) A.I.R. 1938 Nag. 434 : (I.L.R. (1938) Nag. 604)	8
('41) A.I.R. 1941 Nag. 209 : (I.L.R. (1942) Nag. 73)	5

Order.—This is a revision petition against the order dated 6-8-1951 in civil suit No. 74 of 1951 in the Court of the Subordinate Judge, Bhopal, holding that the document dated 23-5-1948, filed by the defendant is inadmissible in evidence and refusing to permit him to confront the plaintiff with it in his cross-examination.

[2] The non-applicant plaintiff's suit was for division of a house said to have been purchased and owned jointly by the parties in equal shares from their father and for separate possession of the plaintiff's share. The defendant's main contention was two-fold, viz., (1) that no part of the consideration of the sale-deed for the house was paid by the plaintiff, and (2) that on 23-5-1948 there was a settlement of disputes over the immoveable properties of the parties and a memorandum was prepared and signed by them and others who were present and as such the plaintiff was not entitled to any share in the house. On issues being framed, the plaintiff was placed in the witness-box for his evidence and in cross-examination the defendant's learned counsel sought to question him in regard to what is called a memorandum dated 23-5-1948. The learned Subordinate Judge held that it was "a deed of cancellation so far as its first entry is concerned" and as such was compulsorily registrable and could not be used even for proving a recital in the entry No. 1 in it and hence it was inadmissible in evidence and rejected it. It is this order that is challenged.

[3] The first point for determination is whether the Court should entertain the revision petition. The ordinary rule is that this Court refuses to interfere in a case at an interlocutory stage except in extreme cases. In my opinion, if the question of admissibility or otherwise of the document is not examined at the early stage to which the suit has reached, there is a possibility of multiplicity

of proceedings in case the decision is against the defendant and the appellate Court does not agree with the view of the trial Court which finding would entail a remand and a fresh decision and an appeal over again. To avoid such multiplicity, therefore, I feel that this Court should examine the question in this case and decide it.

[4] The next point for determination is whether the document was compulsorily registrable and even if so, it was admissible in evidence to prove a collateral purpose. The document was prepared with a view to an agreement towards an amicable division of the property of the father. According to the defendant there was a mere agreement as stated in the document. It is not said that as per this document different items of the property were allotted to the brothers and transfers were effected. The document proposes that particular steps *should be* and not *have been* taken in respect of the different items of the property. The last portion of the document even says that all the brothers admitted on oath all the items except numbers 10 to 13 and out of the four brothers one Jawad Husain left under protest.

[5] For the purpose of construing the document it has to be read as a whole as contended by the learned counsel for the non-applicant. It would thus appear that the document read as a whole evidences not accomplishment of the transfer or creation or extinction of any interest in the immoveable property, but a mere proposal to do so. The question is not, as in the case of *Ganpat Gangaji v. Namdeo Bhagwanji*, A. I. R. 1941 Nag. 209, cited on behalf of the non-applicant, whether there was an expression of intention to sever, but whether there was actually a division of property and as such, in my opinion, that decision of the Nagpur High Court is not applicable to the case on hand. It must be remembered that no question of severance of interest arises in the case of Mohammadens as in the case of a joint Hindu family or coparcenary.

[6] Examining and translating the document in regard to the item No. 1 of the house property, the correct translation is :

"Residential house, the sale-deed of which is in the name of Tufail Ahmad and Anwar Ahmad, the rupees for which have been paid by Sayed Tufail Ahmad and Anwar Ahmad did not pay any rupees therefor, should be transferred to Tufail Ahmad." (*Muntakil Kiya Jay.*)

The learned Sub-Judge's translation of the last expression as noted : "is transferred exclusively" is incorrect. This is conceded by the learned counsel for the non-applicant during arguments. This clearly states what the parties expressed in respect of the house and I am clear that it indicates only a proposal to transfer the house, with the adjectival clauses qualifying it, to Tufail Ahmad. I am further clear that taken as a whole or in part, the document is not a deed of partition, but falls within the ambit of cl. (v) of sub-s. (2) of s. 17, Registration Act, and as such, was not com-

pulsorily registrable and was thus admissible in evidence.

[7] The allegation of the defendant was that no part of the consideration for the sale-deed was paid by the plaintiff and that this fact had been admitted by the latter in the document. It is in order to prove this fact that the defendant seeks to prove the admission in the rebuttal of the allegation of the plaintiff as placed in issue No. 2. It is doubtful if the issue No. 5 is correct as it is not the case of the parties that the house was owned by their father till his death.

[8] Even if, therefore, the document was compulsorily registrable under the proviso to s. 49, Registration Act, it is admissible to prove a collateral transaction viz: the admission of the plaintiff, who is said to have signed the document, that :

"Rupees for which have been paid by Sayed Tufail Ahmad and Anwar Ahmad did not pay any rupees therefor."

In *Rajani Kanta v. Bashiram Mestari*, A. I. R. 1929 Cal. 636, it has been held that :

"Although under S. 49 document which should be registered and is not registered is inadmissible as evidence of a transaction affecting property, yet when it is put forward as containing an admission it is not being put forward as evidence of a transaction affecting property and so it cannot be said to be inadmissible as evidence of an admission."

In *Devi Dayal v. Wazir Chand*, 61 Ind. Cas. 328 (Lah.), it has been held that :

"An unregistered deed of lease for a period of more than one year, although inadmissible in evidence as a lease or as a document proving title, may be admitted in evidence for the purpose of proving an admission contained therein."

Similar observations are found in *Sailesh Chandra v. Bireswar Chatterjee*, A. I. R. 1930 Cal. 559; and it has been added that :

"When such a statement is admitted as an admission it is only a piece of evidence and it is open to the party who has made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be."

The learned counsel for the non-applicant referred to the decisions in *Sukhlal v. Bisesar*, A. I. R. 1929 Nag. 115 and *Narayan Sakharam v. Co-operative Central Bank, Malkapur*, A. I. R. 1938 Nag. 434. I have perused the decisions and find that they are not applicable to the question for decision on hand.

[9] These were the only two points raised in the revision petition. The document dated 23-6-1948 is held to be admissible in evidence and the revision petition is, therefore, allowed with costs against the non-applicant who shall bear his own costs. The order of the learned Subordinate Judge, rejecting the document and refusing to permit it to be proved, is set aside and it is ordered that the document be admitted and be allowed to be proved for the purpose as stated by the defendant and the evidence be proceeded with. Pleaders' fees in this Court will be Rs. 25 on each side, if certified in time.

B/D.H.

Revision allowed.